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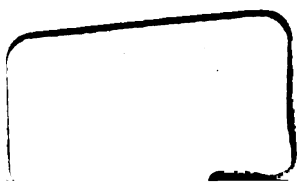
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# CANADIAN CRIMINAL CASES ANNOTATED.

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the Provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

EDITED BY  
W. J. TREMEER,  
OF THE TORONTO BAR.

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# Canadian Criminal Cases.

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Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE THE HONORABLE MR. JUSTICE DRAKE.

## THE QUEEN v. NICOL.

*Venue—Change of—Charge of defamatory libel—Defendant's application on ground of political influence of prosecutors—Cr. Code 651.*

1. In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs.
2. The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue.

DECIDED: June 11, 1900.

Motion for change of venue from the County of Victoria. The defendant was charged with criminal libel in respect of an article in "The Province" newspaper published in Victoria on 11th December, 1897, reflecting on the conduct of Messrs. Turner and Pooley, then members of the Provincial Executive.

The motion was made under section 651 of the Criminal Code, 1892, which section is in part as follows:

“ Whenever it appears to the satisfaction of the Court or Judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the Court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any Judge who might hold or sit in such Court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the Court or Judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the Court or Judge thinks proper to prescribe.”

The cause had been tried at Victoria in February, 1899, and in April, 1900, and in each of the trials the jury failed to agree.

The affidavit of W. H. Langley, solicitor for the defendant, used in support of the motion set out that the prosecutors were, at the time of the alleged libel, and still are, interested in politics, and that in his belief it would be impossible to obtain a fair and impartial trial in the City or County of Victoria.

VICTORIA, B.C., June 11, 1900.

*Langley*, for the motion, cited *Brown v. Vernon* (1860), 2 L.T.N.S. 251.

*Cassidy*, contra, cited *The Queen v. Ponton* (No. 1) (1898), 2 Can. Cr. Cas. 192, 18 Ont. Pr. 210 and *The Queen v. Ponton* (No. 2) (1899), 2 Can. Cr. Cas. 417, 18 Ont. Pr. 429.

VICTORIA, B.C., June 11, 1900.

DRAKE, J.—

Mr. Langley, for the defendant, applies to change the venue to some other County.

The defendant is charged with libel and there have been two abortive trials in Victoria.

The affidavit alleged that the prosecution are interested in politics in the City and County of Victoria, and have been for a number of years, and that owing to the nature of the libel the deponent believes it will be impossible to obtain a fair and impartial trial in Victoria. The grounds here alleged for a removal of the indictment are of the very slightest character. The prosecution being interested in politics is a fact applicable to most people in the Province. In order to obtain a change of venue there must be some facts alleged which will satisfy the Court that a fair trial in the district cannot be had. In *Regina v. Ponton et al* (1898), 2 Can. Cr. Cas. 192, very full affidavits of the state of public opinion hostile to the prosecution and of threats and demonstrations against the jury were forthcoming and the learned Judge who heard the application preface his remarks with the enunciation of the well-established rule that all cases should be tried where the offence is supposed to have been committed and that the rule should not lightly be ignored. Here there is no fact sworn to which induces Nicol to believe that a fair trial cannot be had in Victoria. If being interested in politics is a ground for change of the place of trial, I should consider it impossible to name a place in the Province where the same objection might not be raised.

The fact that two trials have already been had and the jury have failed to arrive at a verdict is a matter to be



regretted, but it does not impress me with the fact that a fair trial cannot be had.

There is no allegation of any political excitement existing or of any prejudice against the defendant or, in fact, of any interference whatever having been taken in the trial. Under these circumstances I must refuse the application with costs.

*Motion dismissed.*

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[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, SENIOR COUNTY  
JUDGE, CHAIRMAN OF SESSIONS.

**THE QUEEN v. TORONTO RAILWAY COMPANY.**

*Maintaining a nuisance—Corporation operating electric railway—Running cars without proper fenders—Negligence endangering life—Demurrer to indictment—Practice—Cr. Code 191, 213, 629, 635, 638.*

1. An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash.
2. The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under the Criminal Code, secs. 191 and 213, for which an indictment will lie.

DECIDED: May 14 and June 1, 1900.

The defendant corporation were indicted for maintaining a nuisance in running cars without proper fenders upon the streets in the city of Toronto, and a motion was made by the defendant corporation to quash the indictment.

TORONTO, May 14, 1900.

*Dewart*, Q.C., for the Crown, took the preliminary objection that a motion to quash did not lie and that an indictment for a nuisance is not to be quashed but is to be demurred to.

*Dewart*, Q.C., in support of objection: This is the old practice, *R. v. Belton*, 1 Salk. 372. *Rex v. Sutton*, 4 Burr. 2116. The provisions of the part of the Criminal Code applicable to corporations (Part XLVII) show clearly that the proper course is to demur; see Criminal Code, sections 635 and 638. The only cases in which a motion to quash is contemplated is where the court in the indictment is not founded on the facts or evidence disclosed on the depositions taken before the Justice, or where the necessary formalities have not been complied with and the consent of the presiding judge or the Attorney General has not been obtained. Section 641. This section cannot apply in this case because the indictment for a nuisance is preferred without any preliminary investigation before a Justice and the written consent of the Chairman of the Sessions is endorsed upon the indictment. Section 629 of the Code does not modify the provisions of the part of the Code relating to Corporations, but merely provides that in either case referred to in section 629 the appropriate motion, whether by demurrer or by motion to quash, shall be taken before pleading and not afterwards.

*Bicknell*, for the defendant corporation: Section 629 gave the alternative right either to demur or to move to quash the indictment. There are cases in which indictments against corporations have been quashed for irregularities appearing upon their face; for example, indictments for maintaining a nuisance by the non-repair of a highway. In any event there is the

alternative right and if a motion to quash is not allowed, the defendant company should be allowed to demur and then to plead over. *The Queen v. Birmingham & Gloucester Railway Co.*, 3 Q.B. 228. The Crown is too late in taking the objection after having consented to the hearing of a motion to quash and after a day had been fixed for the argument. The objection should have been taken before any enlargement was granted for the purpose of arguing the motion.

TORONTO, May 14, 1900.

MCDougall, Co. J.—

I am of opinion that the old practice still prevails in the case of indictments against corporations for maintaining a nuisance and that the provisions of the Code show clearly that it was not the intention to alter this practice in the case of corporations, and that the only right that the defendant corporation has is either to demur to the indictment or plead to it. Under the circumstances, I will give the defendant company the right to demur, filing the demurrer and serving the Crown with a copy of the demurrer within one week. If necessary, leave will be granted to plead over.

[The defendants, accordingly demurred, and after the hearing of argument thereon the learned Chairman delivered the following judgment upon the demurrer.]

TORONTO, June 1, 1900.

The indictment in this case charges in the first count that the defendants, an incorporated street railway company, have for a number of years been operating an electric railway and running cars thereon carrying passengers, etc.,

on Yonge Street and other streets in Toronto, such streets being public highways; that such cars were under the control of the defendants' servants, and that the defendants were bound and ought to use only cars of the most approved design for service and comfort; that in the absence of reasonable precaution and care such cars so operated, etc., might endanger human life, and that the defendants were under a legal duty to take reasonable precaution and care to avoid danger to human life. That the defendants during the period between 1892 and the date of laying the indictment, without lawful excuse unlawfully neglected and unlawfully omitted to take reasonable precautions, etc., to avoid danger to human life, etc., and maintained and ran cars not of the most approved design for service and comfort, and omitted to provide proper and approved fenders or guards or appliances to avoid danger to human life for use in front of the cars, including car 524, in consequence whereof the lives, safety and health of the public, as well foot-passengers, etc., using Yonge Street were endangered, and in consequence whereof the defendants did on the 8th December, 1899, cause the death of one Andrew Davidson whereby during the time aforesaid the defendants did commit a common nuisance, etc., thereby endangering the lives, safety and health of the public, as well foot-passengers, etc., as also other subjects of our Lady the Queen, etc., contrary to the statute, etc.

The second count charges that the defendants during the time hereinbefore set out, in the manner set out in the first count, did unlawfully commit a common nuisance thereby then occasioning injury to the person of a certain individual, to wit, to the person of Andrew Davidson against the form of the statute, etc.

And the third count charges a common law nuisance

by maintaining and operating on Yonge Street, a highway, etc., in the city of Toronto, a number of cars, including car 542, without taking reasonable precautions, etc., to avoid danger, etc., in the maintenance and operation of the said cars, etc., on Yonge Street, etc., and without providing proper fenders, etc., whereby the lives and safety of the subjects of our Lady the Queen, etc., during the time aforesaid using Yonge Street, were imperilled and endangered, etc., and said subjects could not go, pass, return, repass, etc., on foot or with horses and vehicles, etc., through and along Yonge Street, etc., against the peace of our Lady the Queen, etc.

Mr. Bicknell for the defendant filed a demurrer alleging that no offence in respect of which the defendants are liable is disclosed by any one of the three counts above set out.

By section 191 of the Code, a common nuisance is defined to be "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects."

Section 213 of the Code defines what is the legal duty cast upon persons having under his or their charge or control anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever, which, in the absence of precaution or care, may endanger life; such persons, the section declares, "are under a legal duty to take reasonable precautions and use reasonable care to avoid such danger, and are criminally responsible for the consequences of omitting without lawful excuse to perform such duty."

The right to operate the defendants' electric railway is granted to them by the Ontario Legislature—55 Vic. (Ont.)

Cap. 99—subject to the terms of certain agreements made with the city of Toronto. Neither the Act of Parliament nor the defendants' agreement with the city of Toronto defines with any particularity the kind of cars authorized to be used on the railway. The agreement describes the cars to be provided by the defendants during their franchise briefly, in general words, as "cars of the most approved design for service and comfort"; there is no condition imposed upon the defendants or no contract upon the part of the defendants, to adopt any particular design of car with the object of guarding the general public using the highway from any danger which might arise by reason of the passage of the cars along the highway. The provisions contained in the agreement appear to have been framed rather to provide for the safety and comfort of those using the cars as passengers. The public, therefore, can only look for protection to the general law applicable to those using the highway; such law would apply to a street railway company operating cars constructed in such a manner as to likely endanger the lives and safety of persons using the highway in common with the railway.

The defendants have acquired no rights for their cars on the highway, not possessed by other persons using vehicles, save that the railway company have the first right of way over their own tracks, other vehicles being obliged to give way to them. The defendants are subject civilly to the same liabilities for negligence as the ordinary citizen; their criminal responsibility is as extensive as that of a private individual. The fact that they are a corporation, of course, affects the nature of the penalty to be imposed upon them for breaches of the criminal law, and differs from that which might be inflicted upon a private individual committing the same offence. If the rights now possessed by the defendants in regard to operating an

electric street railway were vested in private persons not incorporated as a company, there would be no distinction in the penalties liable to be incurred by the private owners of such a street railway, and persons operating a bus line or carrying on any other business employing a number of vehicles for use upon the highways of the city. The Crown in proceeding by indictment for a nuisance are taking the only course open to secure an abatement of the evil alleged to exist in this case, should it be found upon the evidence adduced at the trial that a danger to the lives and safety of the public was created by reason of the class of cars used by the defendants in their business of transporting passengers over the streets of the city. As put by Mellor, J., in *Regina v. Stephens*, in L.R. 1 Q.B. pp. 707 :

"It is quite true that in point of form the proceeding (by indictment for a nuisance) is of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment, between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance instead of being merely a nuisance affecting an individual or one or two individuals, affects the public at large, and no private individual without receiving some special injury could have maintained an action."

Again he says, "Inasmuch as the object of this indictment is not to punish the defendants, but really to prevent the nuisance being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment." Blackburn, J. and Shee, J. concurred, Blackburn, J. saying that where a person so

carries on a business "as in fact to cause a nuisance to a private right for which an action would lie, and the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would support the indictment,"

I am of opinion that the defendants were under a legal duty to operate their cars upon the highway using such reasonable and proper precautions and care as to avoid endangering the lives of the public using the highways in common with themselves. What form these precautions ought to take must be largely a matter of evidence. Whether the class of cars in use by the defendants on their tracks in Toronto with or without such appliances as fenders amounted to the exercise of such reasonable precaution and care must be for the jury to determine.

From these considerations I must hold that the indictment in this case, so far as form is concerned, discloses an indictable offence, and the defendants demurrer must, therefore, be overruled.

*Demurrer overruled.*

**Note :—**

See also *The Queen v. The Great West Laundry Co.* (1900) 3 Can. Cr. Cas. 514 (Man.) and *The Queen v. Union Colliery Co.* (1900) 3 Can. Cr. Cas. 523 (B.C.)



## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, LANDRY, BARKER,  
VANWART, AND MCLEOD, J.J.

## THE QUEEN v. McGUIRE.

*Grand jury—Practice as to summoning—Disqualification of sheriff—  
Invalidity of proceedings—Subsequent venire to coroner—Jurisdiction  
to summon several grand juries—Cr. Code 656.*

1. An order of a superior Court to a coroner to summon a grand jury need not shew on its face all the facts which made it necessary that a coroner, instead of the sheriff, should be directed to summon the jury.
2. Where a grand jury has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it.
3. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff.
4. There is at common law inherent power in a superior Court of criminal jurisdiction to order one or more grand juries to be summoned.
5. The sheriff or coroner may be directed by the one order to summon both a grand and a petit jury.

ARGUED: January 28, 1898.

DECIDED: February 22, 1898.

Crown case reserved. The prisoner was convicted of receiving stolen goods and sentenced to four years in the penitentiary by Mr. Justice VanWart, at the Carleton Circuit in November, 1897. The facts and points reserved for the opinion of the Court are set out in the judgments of the learned Chief Justice and Mr. Justice Hanington.

FREDERICTON, N.B., January 28, 1898.

A. B. Connell, for the prisoner, relied upon the objections which are given at length in the judgment of Hanington, J., and also cited the following authorities:

*Pelton v. Temple*, 1 Han. (N.B.) 274; Con. Stat. c. 45, ss. 8, 9, 12, and 13; *Brisebois v. The Queen*, 15 Can. S.C.R. 421; Worcester's Dic., "Body;" Tomlin's Law Dic., Vol. I., "Jury."

*White*, A.-G., for the Crown: 1 Chit. Crim. Law, 309 and 310; Bac. Abr. B, section 1, "Jury;" Criminal Code, section 656.

*Stockton*, Q.C., in reply.

FREDERICTON, N.B., February 22, 1898.

TUCK, C.J.—

The prisoner was convicted of receiving stolen goods before Mr. Justice VanWart, at the Carleton Circuit in November, 1897, and sentenced to four years in the Dorchester penitentiary. Sentence was suspended until the first of March following, in order that certain points as to the summoning of the Grand Jury, which found a true bill, might be argued before the full Court. When the Circuit Court met in November there was no criminal business, so that all the Grand Jurors were discharged and all but seven of the Petit Jurors. After proceeding for a time with the trial of a civil cause, the Court was adjourned until the thirtieth of November. A second Grand Jury was summoned for the adjourned Court without an order. On an order made by the Court the sheriff summoned another Grand Jury, practically the same as the second. There were three counts in the indictment upon which the Grand Jury last summoned found a true bill. The prisoner pleaded guilty to two of the counts. Afterwards this plea was withdrawn and another Grand Jury was summoned who found a second bill. The venire under which the last jury was summoned went to a Coroner.

The first objection made is that there is no order whatever, or no proper order of the Court or presiding Judge, directing the summoning of the Grand Jury by the Coroner; the order should shew on its face everything necessary to warrant its being issued. This objection might prevail if the order for the jury had been issued by an inferior Court or justice of the peace, but it is entirely different as regards a superior Court. A warrant or order issued by an inferior Court must shew jurisdiction on its face. It is not so as to an order granted by a Judge of a superior Court. There jurisdiction need not appear on the face of the order. This question is fully discussed in *Howard v. Gosset*, 10 Q.B. 358. In that case, pursuant to an order of the House of Commons, the Speaker issued his warrant, which, after reciting that the House of Commons had that day ordered that the plaintiff should be sent for in the custody of the sergeant-at-arms attending the said House, did require and authorize the said sergeant-at-arms, then attending the said House of Commons, to take into custody the body of the plaintiff. It was there held by Lord Denman, C.J., and Coleridge, J., that the warrant was bad, though purporting to be issued under an order of the House of Commons, because it did not specify any cause for the arrest; and on this ground the Court of Queen's Bench held that the plea shewed no justification for the arrest. Williams, J., dissented, and said "the warrant was "not to be examined strictly like that of an inferior Court "or justice of the peace; and using the latitude of "intendment allowed in construing warrants of superior "Courts and coupling the mandatory part with the recital, "it might be understood that the warrant ordered the "officer of the House to bring the plaintiff before them for "a cause which they had deemed sufficient to authorize "sending for him; and for the sufficiency of that cause

"credit must be given to the House, as to a superior Court." This judgment was reversed by the Court of Exchequer Chamber, and it was there held that "if the warrant had been that of a justice of the peace or of a Court, acting under a special statutory authority, the objections would have been fatal;" but that the warrant must be construed as process of a superior Court, not appearing on the process itself to be beyond the scope of their jurisdiction; and, so considered, it was sufficient. Parke, B., delivered the judgment of the Court of Exchequer Chamber and said: "The difference between the opinion of this Court and that of the majority of the Queen's Bench is only this: that they construe the warrant as they would that of a magistrate; we construe it as a writ from the Superior Court. The authorities relied upon by them relate to the warrants and commitments of magistrates. They do not apply to the writs and mandates of Superior Courts, still less to those of either branch of the High Court of Parliament."

In *Peacock v. Bell*, 1 Saund. 74, the rule as to pleading is well expressed thus: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."

Writs issued by a Superior Court, not appearing to be out of the scope of their jurisdiction, are valid, and of themselves, without any further allegation, a protection to all officers and others in their aid acting under them, and that although they be on the face of them irregular or void in form; for the officers ought not to examine the judicial act of the Court, whose servants they are, nor exercise their judgment in ascertaining the validity of the process

in point of law, but are bound to execute it, and are therefore protected by it: *Turner v. Felgate*, 1 Lev. 95; *Cotes v. Michill*, 3 Lev. 20.

The next objections are that there is nothing to warrant the issuing of the order, as the Grand Jury which found the original indictment had not been discharged by any legal objection; there was nothing to warrant the issuing of the order, as at the time of the motion the first indictment had not been disposed of; and, third, the power of the Court under ss. 9 or 13 of c. 45 Con. Stat. to summon a Grand Jury had been exhausted; two Grand Juries having been summoned for this Court, another cannot be summoned.

I think that there is at common law, apart from any statutory authority, inherent power in the Court to order one or more Grand Juries to be summoned. In 1 Chitty's Criminal Law, pages 309 and 310, the mode of summoning and procuring the attendance of persons duly qualified to serve on Grand Juries is stated: "Upon the summons of any sessions of the peace, and in case of commissioners of oyer and terminer and gaol delivery, there issues a precept either in the name of the King or two or more justices, directed to the Sheriff, upon which he is to return twenty-four or more out of the whole country, namely, a sufficient number out of every hundred from whom the Grand Jury is selected." Upon the precept, although it generally specifies twenty-four, the Sheriff usually returns forty-eight. Two Grand Juries are usually summoned. In Bacon's Abridgment, page 314, under the head "Juries" (b), the author says: "But justices of gaol delivery may have a panel returned by the Sheriff without any precept or writ; and the reason given for it is, that before their coming they make a general precept

“to the Sheriff on parchment, under their seals, to bring  
“before them at the day of their sessions twenty-four out  
“of every hundred, etc., to do those things which shall be  
“enjoined them on the part of the King, etc., and there-  
“fore it is said that they need not make any other precept  
“for the return of a jury for the trial of any issue joined  
“before them, but that their bare award that the jury  
“shall come is sufficient, because they are enough for that  
“purpose supposed to be present in Court, whom the  
“Sheriff may return immediately, whenever the Court  
“shall demand their service: 2 Ins. 568; 4 Ins. 168; 2  
“Hawk. P.C., c. 41, s. 1.”

The practice as to summoning Grand Juries is fully discussed in *Regina v. Mailloux*, 3 Pugs. (N.B.) 493, by Allen, C.J., and Weldon, J. The latter refers to a case before Lord Chief Justice Mansfield, reported in 2 Burr. 1088, where the Sheriff had summoned eighty Grand Jurors. This coming to the notice of the Chief Justice he said it would be monstrous to swear four score; the officer could not properly swear more than three and twenty. By the common law the person to whom the jury process was directed, whether Sheriff or Coroner, chose whom he would summon to attend and place upon his panel. It has been held again and again that the summoning of more Grand Jurors than twenty-four does not vitiate the panel. The Justice presiding at a Court may reform a panel, and the Sheriff is bound to return a panel so reformed.

It is further objected that there is nothing to shew any interest or disqualification in the Sheriff; and Coroners cannot summon unless this appears. I have already referred to the first of these objections under the head of number one, when discussing the point that the order should shew upon its face everything necessary for its being issued. There was no contention before the Court

that the Sheriff, being a brother or brother-in-law of the prosecutor, did not disqualify him on the ground of bias from summoning the jury. In my opinion the Sheriff ought not to summon a jury when he himself or his brother is the prosecutor.

No return, I suppose, means no proper return; and in this connection it was argued that the order and summons should have been directed to the coroners of the County of Carleton and not to one by name, and that the return should be in the name of all the coroners. In order to make this argument effective, it was necessary for the learned counsel, Mr. Connell (who argued this case with much ability), to contend that s. 12, c. 45 of the Con. Stat. only changes the law as to Petit Juries, and that even if it applied to criminal matters it does not apply to Grand Juries. Section 12 enacts that "whenever the Sheriff is "kin to either party in any cause pending in the Supreme "Court of this Province, or in any of the County Courts "of this Province, or whenever the Sheriff shall be "interested in any cause, any venire hereafter to be issued "to summon a jury may be directed to any one of the "coroners of the County in which such cause is to be "tried; and the said venire may be executed by such "coroner and returned by him, any law, usage, or custom "to the contrary notwithstanding."

Furthermore, it was said that this section does not apply to a criminal matter but only to civil causes; and several sections of the statutes, namely, 701 and 705 and others were mentioned, that when speaking of criminal matters the words "criminal proceedings" or "criminal cases" are used, but never the words "criminal causes." From this it was argued that the section does not apply to criminal proceedings, and therefore that a venire in such cases must still be directed to all the coroners of a county.

Whether this contention is right or not, I am not concerned, in the view I take of this objection to the conviction.

I incline to think that there is no case in Court until the Grand Jury have found a bill, and if this is so the distinction between the meaning of the words "case" and "cause" is not material.

In *Pelton v. Temple*, 1 Han. (N.B.) 274, it was decided that where the Sheriff is interested, the jury process must be directed to the coroners of the county, if more than one; and though it may be executed by one coroner, the return must be in the name of the whole of them. It was also held in that case that a venire directed to one of the coroners of a county is bad unless the others are interested. The reason given for this in *Rex v. Warrington*, 1 Salk. 152; 1 Show. 303, is that all the coroners make but one officer. I think this reason was never applicable to coroners in this Province, because there is one to be found here, and not infrequently there are two, in almost every parish. It is entirely different in England. There is no decision of this Court of a like kind in criminal proceedings, and I think that the Judge presiding at the trial had the power to order the venire to be issued to one coroner, and that his return is a good one.

Another objection to the conviction is urged, namely, that the Grand Jurors were not summoned from the body of the county as required by sections 10 and 11 of chapter 45; that they were summoned from Woodstock only. I think that this objection ought not to prevail. If the jurors were summoned from within the county it is a sufficient compliance with the terms of the statute. The same objection it seems to me (but I cannot remember the name of the case) was once made at nisi prius to a jury which had been summoned wholly from the city of St.



John. The Court there held that the jury had been properly summoned.

Finally, there is this objection, that three of the Grand Jurors who found the present bill were on the jury which found the previous bill, and that having been summoned by the brother of the prosecutor they were improperly summoned. At the most, I think that this could only be urged as a ground of challenge at the trial and not on a motion to quash the conviction. But I fail to see that there was necessarily any bias in the minds of the three jurors simply because they had been formerly summoned on another Grand Jury by a brother of the prosecutor.

Section 656 of the Criminal Code enacts that "No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the Grand Jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded, and that the prisoner has suffered or may suffer prejudice thereby, but not otherwise."

It is not pretended that the prisoner has suffered or may suffer prejudice by reason of the manner in which the Grand Jury was summoned. In fact, he at first pleaded guilty to two of the three counts in the first indictment. For these reasons I think that this motion fails and the conviction must be affirmed.

HANINGTON, J.—

This is a case reserved from the Carleton Circuit, where the defendant was convicted of receiving stolen goods. The prisoner, when arraigned at first, pleaded guilty as to most of the goods; but afterward, on retaining counsel, was allowed to withdraw his plea and defend. A

motion was made to quash the indictment, which was overruled.

The facts as reported are that the Grand Jury attending the opening of the Circuit was discharged, there being no criminal business. During the Circuit the defendant was committed to gaol and an indictment went before a new Grand Jury, summoned by the Sheriff, who found a true bill. Upon its being suggested that the Sheriff was a brother of the prosecutor, the Judge directed a new Grand Jury to be summoned by a coroner, which was done; and a new indictment was found by that jury upon which the trial proceeded to a conviction. The Sheriff's Grand Jury was not formally discharged when the Coroner's Jury was summoned. The objections to the conviction are those taken on a motion to quash the indictment found by the Coroner's Jury, and are as follows:—

1. There is no order whatever, or no proper order of the Court or presiding Judge directing the summoning of the Grand Jury. The order should shew upon its face everything necessary for the issuing.

2. There is nothing to warrant the issuing of the order, as the Grand Jury which found the original indictment had not been discharged by any legal objection.

3. There was nothing to warrant the issuing of the order, as at the time of the motion the first indictment had not been disposed of.

4. The power of the Court under ss. 9 or 13, c. 45 Con. Stat. to summon a Grand Jury has been exhausted; two Grand Juries having already been summoned for this Court, another cannot be summoned.

5. There is nothing to shew any interest or disqualification in the Sheriff; and the coroner cannot summon unless this appears.

6. There is no return.

7. The order and summons should have been directed to the coroners of the County of Carleton, and not to one by name.

8. The return should be in the name of all the coroners.

9. Section 12, c. 45 Con. Stat. only changes the law as to Petit Juries, even if it applies to criminal matters, and does not apply to Grand Juries.

10. The Grand Jurors have not been summoned from the body of the county.

11. Some of the Grand Jurors finding the present bill were amongst those who found the former bill, and having been summoned by the brother of the prosecutor, they are improperly summoned.

12. The summons to the coroner is bad, being for the summoning of both Grand and Petit Juries; should be for each separately. The summons was for a Court holden instead of now being holden.

These objections are, it appears to me, chiefly if not altogether technical, and are founded upon a very strict construction of the Jury Act, c. 45 of the Con. Stat. N.B., and a misconception of the spirit, intention and effect of that Act. The Jury Act is not intended to interfere with or lessen the powers of the Judges of the Supreme Court at common law or their practice in criminal inquiries at Circuits (and included now by statute in the "Circuit Courts" are all the powers of a Judge at nisi prius,oyer and terminer and general gaol delivery) except in so far as that Act does in express terms or by necessary implication declare that intention. The directory provisions of the Act are in many respects merely declaratory of the common law, and we must bear this in mind when we are giving effect to its terms. At common law the trial of criminal cases by jury was the mode before the conquest,

and such mode of trial was the common law right of British subjects—a right no doubt often denied, but still a right. Lord Bacon, in discussing the subject, citing Glanvill, who, I think, lived in the time of Henry II., as the authority, says: “Likewise the antiquity of this trial, and its being peculiar to us, have been taken notice of as matters which reflect honour on our constitution, for though there were anciently several other methods of trial such as battle, ordeal, etc., yet they have from the inconvenience attending them been laid aside, and this alone cultivated and improved as the best method of investigating truth.” Again he says: “Juries are distinguished into Grand and Petit Jurors; the Grand Jury may consist of thirteen or any greater number (not exceeding twenty-three) for these being the grand inquirers of the county, every indictment or presentment by them must be found by twelve at least.” It appears that at common law more than one Grand Jury was summoned, for three attended in some counties, such as Middlesex, in which county there were three hundred, and for each hundred there was a Grand Jury, and in some counties two. The mode of summoning both the Grand and Petit Jurors was, in the early ages, varied, and, as one author says, “is now obscure,” but Bacon says: “Upon summons of any session of the peace, and in case of commission of oyer and terminer and gaol delivery, there goes out a precept either in the name of the King or of two or more Justices directed to the Sheriff, upon which he is to return twenty-four or more out of the whole county, a considerable number out of every hundred, out of which the grand inquest of such sessions of the peace, oyer and terminer and gaol delivery are taken and sworn in—*quirendum pro domino rege et corpore comitatus*.” It had become the practice, as early as the fourth Henry, that

persons were sworn and acted as Grand Jurors who had not been returned by the Sheriff, but appear to have been named by the Court. This was remedied by 2 Hen. IV. c. 9, which recites that such practice had arisen, and enacts that "henceforth no indictment be made of any such person but by inquests of the King's lawful liege people in the manner as was used in the time of his noble progenitors returned by the Sheriff or bailiffs of franchises," etc. The Judges could then reform both the Grand and Petit Jury by directing the Sheriff to add names, etc. In discussing jury process the same learned author says: "But Justices of gaol delivery may have a panel returned by the Sheriff *without any precept or writ*," and, after discussing the reasons for it, says: "But it is doubtful whether this matter does not depend more on practice and on the constant course of precedent than from any argument from the reason of the thing."

From the authorities it seems to me very evident that the power of the Judges of the Superior Courts to summon Grand Juries, as occasion arose, were plain and complete, and the mode of so doing well established, and the Jury Act does not, I think, substantially limit either those powers or the mode. The Act provides for the Sheriff having both a Grand and Petit Jury at the opening of each Circuit, which saves the issuing of a precept therefor before the Circuit, but does not limit the power of a Judge as to further jurors if it becomes necessary in the administration of justice. At common law the Judge as representing the King, which Judges of the Supreme Court yet do, was invested with ample power to insure at the assizes and courts of oyer and terminer the attendance of Grand and Petit Juries so as to organize a duly constituted Court for the trial of those charged with crime, and to enable him to deliver the gaol, as his commission

then, as well as now, required, and he could therefore make all orders and give all directions necessary to attain that end. That the precept for the summoning of jurors was in ancient times signed by the clerk of the assizes, as it was, shews that it was directed by the presiding Judge. As I have already said, the Judge at Circuit has now all the powers of the three ancient commissions, and, as a consequence, can do what was authorized at common law unless his power be limited by statute. Therefore, as to the first objection, his direction for a jury entered by the clerk of the Circuits, upon which the clerk issued an order to the coroner—upon its being stated to the Judge, and he being satisfied of the Sheriff's disqualification—was good enough; and I think any such order need not state the reasons. The reasons would appear on the motion to the Court, and would be on the Judge's notes, which is the record and sufficient. In fact, I do not think an omission to have the reasons entered on the record would invalidate the order for the jury.

The second objection—that the coroner was directed to summon a Grand Jury before that summoned by the Sheriff was formally discharged—cannot, I think, be supported. So far as this case is concerned, it seems to be admitted on both sides that the Sheriff's Jury was no jury.

This also covers the third objection, as the first indictment was substantially no indictment against the defendant if the Sheriff was so disqualified.

As to the fourth objection, I do not think, if it depended on the statute alone, the power of the Court was exhausted. The wording of sections 9 and 13 is not intended to limit it to two juries; but at common law the

power to have juries summoned remains and could be exercised.

As to the fifth objection, I think it enough if the statement of interest or facts which disqualify the Sheriff be suggested to the Judge, and the Court crediting the suggestion, or investigating and trying it if necessary, and finding it as alleged, act upon that finding. Here there seems to have been no question raised as to the Sheriff's disqualification. If he was not disqualified, the indictment of the Coroner's Jury could have been quashed and the array of the Petit Jury challenged, which was not attempted on that ground.

There is nothing in the sixth objection. There was a return by the coroner under the Judge's order, which is enough.

The seventh and eighth objections are in a sense technical. At common law the return of a venire in a civil suit by one coroner has been held insufficient. That is now remedied by s. 12, c. 45, Con. Stat. N.B. But it is contended that that section does not cure a return by one coroner in a criminal matter. That the word "cause" does not apply to a criminal trial. I think it does, and that it cures any defect here if any defect existed. The Judge could direct a Sheriff to procure the jury; and by subsection 37 of section 1 of the Interpretation Act "Sheriff" shall mean "Coroner." If so the Judge could, as he did here, direct one, not necessarily all the coroners. But be the effect of the provisions of the Provincial Acts what it may, I think that section 656 of the Criminal Code cures any such defect as an informal return on processes, etc. It, in this respect, has the effect of the statute of jeofails, of which Lord Bacon, when discussing returns of jury process and the return of a venire by two coroners and a distringas by three, when there were four coroners, says:

"It was agreed that this was a common law error, for that "coroners as ministers must all join, but as Judges they "may divide; but that it was aided by statute of jeofails, "which cures the imperfect and insufficient returns of "processes by Sheriffs and other officers." The words of the section are intended to cure just such defects as are complained of here.

The tenth objection must, I think, also fail. The Jury is in effect summoned from the body of the county. The provision of the Act changes the common law and directs that it shall not be compulsorily limited to any particular part of the county, as it was formally to the hundred. I am quite sure this Court has held that the jury need not be taken from each point of the county, nor does the Act compel the Sheriff or other officer to get jurors from the remote parts of the county. No doubt it is in most cases desirable that jurors should be brought from the different parishes, where it is practicable so to do.

I do not think the matters of the eleventh objection are material. The first bill was no adjudication, and the same objection does not lie to a Grand as it does to a Petit Juror. Practically it would be impossible to make the grounds of a challenge for favour to a Special Jury available as to a Grand Jury. I do not at present see how it could be done, nor have I known it to be done.' At the same time if a party charged, whose case was to go before the Grand Jury, knew of some sufficient reason why a Grand Juror should not sit in his case, I have no doubt a means exists at common law to secure impartial justice. Grand Jurors have in case of relationship abstained from acting in the matters of their kinsmen. However, that does not arise here.



There can be nothing in the twelfth objection. It is simply technical. I see no substantial objection to the order to the Sheriff or coroner directing him to bring both a Grand and Petit Jury. In fact at common law, so far as I can ascertain, the practice originally may have been, and probably was, for both the Grand and Petit Jurors to be taken from the same general panel. However, be that as it may, I see no objection to the same order in Court or to the Sheriff, directing the summoning of both.

I think the conviction must be affirmed.

LANDRY, BARKER, VANWART, and McLEOD, JJ., concurred.

*Conviction affirmed.*

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[COURT OF APPEAL FOR ONTARIO.]

BEFORE SIR GEORGE WILLIAM BURTON, CHIEF JUSTICE OF  
ONTARIO, AND OSLER, MACLENNAN, MOSS AND LISTER,  
JUSTICES OF APPEAL.

**THE QUEEN v. DAVY.**

*Wilful injury to property—Trespass—"Fair and reasonable supposition of right"—Access to shore—R.S.O. ch. 120, sec. 1—Cr Code 511.*

1. Under Cr. Code sec. 511, the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of.
2. The same rule applies to a charge of trespass made under R.S.O. 1897, c. 120, s. 1, under which the magistrate's jurisdiction is ousted if the accused "acted under a fair and reasonable supposition that he had the right to do the act complained of."

ARGUED: May 30 and 31, 1900.

DECIDED: June 29, 1900.

Appeal (by leave) by the defendants from the

judgment of a Divisional Court [ARMOUR, C.J., and STREET, J.].

The defendants were charged, upon the information of Levi Sager, before the Police Magistrate at Napanee, for that they "unlawfully did . . . trespass in and upon the west two-thirds of Lot 9 in the First Concession of the Township of Richmond, in the County of Lennox and Addington, and did do damage to certain fences and fence posts." The complainant was the owner of the land mentioned in the information, which was bounded on one side by the Napanee River, and the defendant Samuel Davy was the owner of, and lived upon, an island in that river, immediately in front of the complainant's land. The defendant's contention was, that he was entitled to drive along the beach or shore of the complainant's property, in order to reach a highway, which ran to the water's edge of the Napanee River, a short distance to one side of the complainant's land. This right had been asserted for some time by the defendant, and he had already been convicted for trespass in attempting to exercise it. Upon the occasion now in question, having previously taken counsel's advice, he drove along the beach, and took down at each side of the complainant's land, a fence erected there by him. He and those who were with him were then proceeded against, and the magistrate, after hearing the evidence, intimated that he would convict. The defendants obtained from ROSE, J., an order, prohibiting the magistrate from proceeding further, but this order was reversed by the Divisional Court. The patent of the complainant's land contained a reservation of "free access to the beach for all vessels, boats, and persons."

TORONTO, May 30 and 31, 1900.

*Clute*, Q.C., and *G. F. Ruttan*, for the appellants: This case comes clearly within the exceptions in R.S.O. ch. 120, sec. 1, and the Criminal Code, sec. 511, for the appellants had a fair and reasonable supposition that they had a right to do the act complained of, and there was an absence of any criminal intent: *Watkins v. Major* (1875), L.R. 10 C.P. 662; *Dickenson v. Fletcher* (1873), L.R. 9 C.P. 1. There was a *bond fide* assertion of a right, and the magistrate could not try the question of title: *Regina v. Davidson* (1880), 45 U.C.R. 91. The facts that counsel was consulted, and that the act complained of was deliberately done, asserting a title, are sufficient to bring the appellants within the exception: *Regina v. McDonald* (1886), 12 Ont.R. 381; *Kinnersley v. Orpe* (1780), 2 Dougl. 516; *Hunt v. Andrews* (1820), 3 B. & Ald. 341; and this is true even if the appellants were mistaken: *Rex v. Speed* (1700), 1 Ld. Raym. 583; Paley on Convictions, 7th ed., p. 145. The reservation in the patent gives the right contended for.

*Aylesworth*, Q.C., and *J. H. Madden*, for the respondent: The jurisdiction of the magistrate depended upon a question of fact, which he was competent and bound to determine, and his finding of fact in favour of his jurisdiction cannot be reviewed in proceedings by way of prohibition: *Regina v. Malcolm* (1883), 2 Ont. R. 511; *White v. Feast* (1872), L.R. 7 Q.B. 353; Paley on Convictions, 7th ed., p. 150. It is not sufficient for the person prosecuted under the statutes in question to shew that he acted in the *bond fide* belief that he had the right to do the act complained of. He must satisfy the magistrate that he had fair and reasonable grounds for entertaining such a belief: *Regina v. Mussett* (1872), 26 L.T.N.S. 429.

The reservation in the patent is for benefit of persons exercising the right of navigation.

*Clute*, in reply.

TORONTO, June 29, 1900.

The judgment of the Court was delivered by

LISTER, J.A.—

The papers filed do not inform us whether the information was laid under sec. 1 of R.S.O. ch. 120, or under sec. 511 of the Criminal Code, but I assume, from its language, that it was laid under both sections.

By the former section jurisdiction is given to a justice of the peace to hear and determine in a summary way, a charge for unlawfully trespassing; and by the latter section the same jurisdiction is given in respect of a charge for wilfully committing any damage to, or upon, any real or personal property. Both sections withhold such jurisdiction if the person charged "acted under a fair and reasonable supposition that he had the right to do the act complained of."

The respondent at the time the alleged trespasses were committed, was the owner and in possession of the lands in question, which extended to the water's edge of the Napanee River.

The appellants, in order to enable them to get to a point on the shore of such river east of the respondent's lands, and claiming the right to cross his lands for such purpose, broke down a part of his west fence, at a point 32 rods north from the water's edge of the river, and drove upon and across his lands, to the fence on the east side thereof, which, at a point 132 rods north from the water's edge of the river, they also broke down.

Their claim was, that they had a lawful right so to do, under a reservation in the grant of such lands from the Crown, which reserved, as they claimed, for the use of the public, a strip of land sufficient for access to the waters of the said river. The grant, however, contains no such reservation, and, even if it did, it is apparent that the appellants, in committing the trespasses complained of, could not have been acting in the *bona fide* exercise of any right which such a reservation could give them in common with the general public. It does contain the usual reservation of free access to the shore for all vessels, boats, and persons, and under this reservation, the appellants in common with the public have an undoubted right to come to the shore from the water, but, in my opinion, it gives them no right of access to the shore from the land, by passing over or across the lands of an adjoining proprietor. It is, therefore, plain that they were not, as of right, entitled to do that which is complained of. The appellants, however, do not now insist on the claim of right then set up, but say that they acted under a fair and reasonable supposition of right, and the reservation in the patent from the Crown of free access to the shore for all vessels, boats and persons is pointed to as affording some evidence that they so acted, and they contend that the magistrate's jurisdiction to hear and determine the complaint is therefore ousted. It is, I think, settled that an honest belief on the part of a person charged under either section, that he had the right to do the act, does not oust the magistrate's jurisdiction. What the sections require in order to oust the jurisdiction of the magistrate is, that the act shall be done under a fair and reasonable supposition of right. Whether such a supposition is warranted is for the magistrate to determine upon the evidence.

In *White v. Feast* (1872), L.R. 7 Q.B. 353, Cockburn,

C.J., in speaking of a similar proviso in section 52 of 24 & 25 Vict. ch. 97, the English Act respecting wilful and malicious injury to property, said: "By that section a person is made liable to be summarily convicted who has committed, either wilfully or maliciously, damage or injury to property; and by the proviso such *prima facie* wrongdoer is not entitled to call upon the magistrates to hold their hands, unless he gives them sufficient evidence to convince them that he acted under a fair and reasonable supposition that he had a right to do the act, although he may have honestly believed that he was justified in doing the act. That is, the Legislature have chosen to put a different restriction upon the jurisdiction of the justices from that which would otherwise have been implied, inasmuch as they have expressly enacted, that in order to oust the justices' jurisdiction there must have been a *fair and reasonable ground for the supposition of the right*. The Legislature, therefore, having expressly stated the limit, it is not for us to impose any other limit; the express restriction supersedes the implied restriction."

In the present case it seems to me that the evidence leads irresistibly to the conclusion that the appellants had no ground whatever for supposing they had a right to enter upon the respondent's lands at the places where the trespasses complained of, are alleged to have been committed.

I do not agree with the contention, that a magistrate's finding of fact in favour of his jurisdiction is in no case subject to review. The rule is laid down by Cockburn, C.J. in *White v. Feast* (1872), L.R. 7 Q.B. 353, in these words: "I quite agree that magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way."

As to the other objections raised and discussed, they are not, in my opinion, fatal to the magistrate's jurisdiction.

I, therefore, do not deem it necessary to enter into a consideration of them.

It follows that the appeal must be dismissed.

See *Howe v. Stawell* (1833), Alcock & Nap. 348; *Blundell v. Catterall* (1821), 5 B. & Ald. 268; *Hargreaves v. Diddams* (1875), L.R. 10 Q.B. 582; *Watkins v. Major* (1875), L.R. 10 C.P. 662; *Denny v. Thwaites* (1876), 2 Ex. D. 21; *Reece v. Meller* (1882), 8 Q.B.D. 626; *Ex parte Vaughan* (1866), L.R. 2 Q.B. 114.

*Appeal dismissed.*

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, McGUIRE AND WETMORE, JJ.

**THE QUEEN v. BREWSTER.**

*Cattle stealing—Cattle brands—Application for new trial—Conviction against weight of evidence—Cr. Code 331, 747.*

1. In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is whether or not the verdict is one which the jury, as reasonable men, ought not to have found.
2. A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favors an acquittal.

ARGUED: June 2, 1896.

DECIDED: June 5, 1896.

Application of the accused for a new trial on the ground that the verdict against him was against the weight of evidence.

The matter came on for hearing on the 2nd day of June, 1896.

*Lougheed*, Q.C., for the accused.

*McCaul*, Q.C., for the Crown.

REGINA, N.W.T., June 5, 1896.

The judgment of the Court was delivered by

WETMORE, J.—

The defendant was convicted before my brother Rouleau and a jury, of the offence of stealing a number of cattle from one Page, and by leave of the learned judge has appealed to this court, on the ground that the verdict is against the weight of evidence.

The evidence establishes beyond all question that a number of cattle which were once owned by Page, were found in the possession of the defendant with the brand which was on them when so in Page's possession, changed and disfigured.

The defendant accounts for these cattle getting into his possession as follows:—That Page was indebted to him in \$300 for money loaned, that pressing him for this money Page agreed to sell him about 38 head of cattle at \$20 a head, and that the defendant thereupon paid Page \$450. These cattle were to be delivered to the defendant; and Page employed one Bowers to drive them over to the defendant's place, at a place called Lone Pine, and on the 10th September met the defendant at Innisfail and told him that the cattle were on the way to Lone Pine. That Page and the defendant proceeded in the direction of Lone Pine, when they met Bowers with 38 head of young cattle and 12 calves, and Page helped the defendant and Bowers to drive these cattle some seven miles farther on to a place called Sproat's Creek, when he (Page) left them and went home. The defendant and Bowers proceeded the next morning with the cattle to John Brewster's, where the defendant proposed to winter them. That after Page and the defendant met the cattle and before Page went home,



the defendant paid him \$10 to make up the price of the 38 head at \$20 a head, and the calves were thrown in. In short the defendant sets up that Page sold him these cattle for \$760. Bowers corroborated the defendant and swore that Page employed him to drive these cattle and deliver them to the defendant. Page swore that he never sold the cattle to the defendant, that he never authorized Bowers to drive or deliver them as above stated, that at the time of the alleged agreement for the sale of the cattle he did not owe the defendant \$300 or any other sum, that the defendant did not pay him \$450, and that he never informed him that the cattle were on the way to Lone Pine, or helped to drive them. If the testimony given by Page is true the evidence for the prosecution establishes a clear case of theft. If the evidence on the part of the defendant is true he is not guilty. The evidence given by Page was in some respects of such a character that the jury would have been warranted in discrediting it altogether. He certainly with respect to some important matters shewed that his memory must have been very bad or he was untruthful. At the same time I cannot say that the jury would, for these reasons, be bound to wholly discredit him. It was just a case where the credit to be given was entirely for the jury, and there was other evidence that the jury might consider corroborative of Page. There was also testimony which the jury might consider corroborative of the defendant's testimony. He was corroborated by Bowers as before stated, and also by the fact that Page and the defendant met him with the cattle and helped him drive them to Sproat's Creek. Other witnesses were called who testified that they saw Page and the defendant and Bowers together driving the cattle; other witnesses testified that they saw the defendant and Bowers with cattle over the route they stated they drove

them, and at or about the time stated. A witness testified he met Page and the defendant riding together on the 10th September between Innisfail and where the defendant says he met the cattle. Another witness swore that he heard the bargain between Page and the defendant for the sale of the cattle, as stated by the defendant. But while there was this testimony, the credit to be given to the witnesses was entirely for the jury.

On behalf of the Crown there was the testimony of Page, to which I have referred; there was the fact that the brands which were on the cattle when they were in Page's possession were altered and disfigured by the defendant. A very important question upon which the parties contradicted each other was, whether Page was indebted to the defendant in \$300 or any other sum when the alleged agreement for the sale of the cattle was made in the latter part of July. Because if he was so indebted the defendant's story would be quite probable; but if he was not so indebted the defendant's story must be a fabrication. The defendant swore that this indebtedness of \$300 was made up of a sum of \$200 loaned by him to Page on October 17th, 1893, and a sum of \$100 loaned to him before that date. Page, although at the first trial of this case (for it was tried twice) he denied borrowing the \$200, eventually admitted it, and the cheque for that amount signed by the defendant was produced. But he swore that on the 5th February, 1894, he and the defendant had a settlement of their affairs, and everything was then adjusted between them, and he produced a receipt of that date signed by Brewster, which acknowledged payment of all accounts in full up to that date. The defendant swore that the \$300 was not included in the settlement, that the settlement was money of a partnership between him and Page, and that the \$300 was left out because Page did not

want his wife to know about the \$200 loan. There, however, is the receipt, and that on its face corroborates Page ; and moreover Mrs. Page corroborates her husband that all accounts were settled on the 5th February, and she swore that at that time she was aware of the \$200 indebtedness to the defendant. The testimony for the defendant was to the effect that the place where they camped with the cattle at Sproat's Creek on the 10th September was at the bridge. The evidence shews that this bridge was in sight of Sproat's house and that the country is open ; while Sproat will not swear that there was a band of cattle there that evening he swears that he was home and that he neither saw the defendant nor Bowers nor a band of cattle that evening or the next morning. Several witnesses were called who were in a position to see a bunch of cattle such as the defendant alleged he was driving if they passed along the route at the time specified, yet while they will not swear such a bunch did not pass, they swear they did not see them. While this testimony was possibly of a slight character, still it was a circumstances for the jury to consider.

It is, I think, significant and worthy to be marked, although possibly not of very great weight, that when the cattle broke loose the night they were taken to John Brewster's they wandered back in a direct line between that place and Page's ranche instead of going by the very circuitous route by which they had been driven to John Brewster's. It is also significant that two witnesses swore that they saw the defendant and Bowers down at James Brewster's, which is close to Page's ranche, before the snow storm, and one of these witnesses swore that they were then looking for cattle. Then it is stated that the drive of over seventy miles in three days was a very long drive and one that it is very unlikely that a person would

force his own cattle at that time of the year. The jurors would be quite familiar with that question. According to Bowers' own statement some of the calves were about played out when they got to Lone Pine at noon on the 10th, yet they drove them on that day to Sproat's Creek, and drove them 30 miles next day. The probability of this was a question entirely for the jury. The defendant's case attempted to set up that Page put a new brand on the cattle or altered the brand before the delivery because the defendant did not want any cattle with another brand on the E brand. There was some evidence on the part of the Crown other than that of Page, to shew that after the alleged contract of sale and before the alleged delivery, no cattle were branded at Page's ranche, and that there were no cattle in the corrals at Page's on the 9th September for Bowers to drive away. The jury might also have considered it out of the usual course for the defendant to have returned the receipt for \$750 when the cattle were delivered.

The learned trial judge has informed the members of this court that he is dissatisfied with the verdict and thinks that the defendant ought to have been acquitted, and that while he left the question of fact to the jury, and under the evidence he could not do otherwise, yet on commenting on the facts he charged in favour of the defendant.

I am free to confess that looking at the evidence as it appears on paper, I think if I had been trying the case without the intervention of a jury I would have acquitted the defendant. I have not, however, had the opportunity of observing the demeanour of the witnesses, the jury have, and they are, when there is a jury, the constituted judges of the facts. It has been urged that when an appeal has been brought on the ground that the verdict is

against the weight of evidence, the court will as a matter of course order a new trial if the judge expresses himself dissatisfied with the verdict. That, however, is not the law as established by the later authorities. The law as so laid down is, that in deciding whether there should be a new trial the question is whether the verdict is one that the jury as reasonable men would properly find. *Solomon v. Bitton*, 8 Q.B.D. 176; *Webster v. Friedeberg*, 17 Q.B.D. 736; and see *The Metropolitan Railway Co. v. Wright*, 11 A.C. 152; *Commissioners of Railways v. Brown*, 13 A.C. 133, and *Phillips v. Martin*, 15 A.C. 193. No doubt in deciding the question as to the reasonableness of the verdict the opinion of the trial judge is entitled to and ought to receive great weight. But it is not conclusive. I am unable to bring my mind to the conclusion that the verdict in this case was one that the jury as reasonable men ought not to have come to. I moreover think that it is worthy of consideration that the defendant, although he has had two trials, was unable to satisfy either jury that Page's testimony was a fabrication, the first jury having disagreed. I think the new trial should be refused.

RICHARDSON, MCGUIRE, and SCOTT, JJ., concurred.

*New trial refused.*

**Note:** *Cattle frauds—Cattle brands as evidence.*

See the new sections introduced into the Criminal Code by the Amendment of 1900. 3 Can. Cr. Cas. pages 571 and 586.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., ROSE AND MACMAHON, JJ., SITTING  
AS A COURT OF CRIMINAL APPEAL.

**THE QUEEN v. BRENNAN.**

*Murder or manslaughter—Provocation—Ejecting caller from doorway—  
Exercise of legal right—Sufficiency of notice to leave—Excessive force  
in ejecting—Judge's charge—Misdirection—Facts for the jury involved  
in question of legal right—New trial—Cr. Code 229, 744.*

1. Although, by Cr. Code sec. 229 (3), no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury, and not for the Judge, to determine any preliminary question of fact upon which the alleged legal right depends.
2. Where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose.
3. It is misdirection for the trial Judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is the withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitled the prisoner to a new trial.

ARGUED: May 8, 1896.

DECIDED: May 18, 1896.

The prisoner was tried at Barrie before Armour, C.J., and a jury, upon an indictment for the murder of John A. Strathy, and was found guilty.

On the 4th May, 1896, *Lount*, Q.C., for the prisoner, moved under sec. 744 of the Criminal Code, before a Divisional Court composed of Meredith, C.J., and Rose and MacMahon, JJ., for leave to appeal against the verdict, and to move for a new trial, leave in writing having been granted by the Attorney-General.

*J. R. Cartwright, Q.C.*, appeared for the Crown.

Leave was granted by the Court.

Pursuant to sec. 744 and the leave granted, a case was stated by Armour, C.J., for the opinion of the Court, the questions asked being :

(1) Was the prisoner, on the evidence, properly found guilty of murder ?

(2) Was there any misdirection in the charge on the grounds complained of ?

*Lount, Q.C.*, for the prisoner : The learned Chief Justice was in error in entirely withdrawing from the jury the question of manslaughter. He directed the jury that they could find only murder unless the plea of insanity was sustained. He was wrong in himself determining the facts ; the facts were for the jury. It was for the jury to say whether the act of the deceased in putting the prisoner out was an insult or a wrongful act. The Judge has not the right to determine any single fact. He took the evidence of Greer, the detective, and found that the deceased was doing what he had a legal right to do. But, even if no other witness had been called, the jury had the right to reject his evidence, if they chose to disbelieve it. The mental condition of the prisoner rendered him liable to provocation. There was greater provocation to him than to an ordinary man. The nature of the man must be considered in determining whether there was provocation : *Rex v. Lynch*, 5 C. & P. 324 ; *Rex v. Thomas*, 7 C. & P. 817 ; *Regina v. Davis*, 14 Cox C.C. 563. The action of the deceased in putting the prisoner out of his house was not justifiable at all. If a person receives a blow and immediately avenges it, it is not manslaughter : *Rex v. Anderson*, 1 Russell on Crimes, 5th ed., p. 701 ; *Rex v. Thomas*, 7 C. & P. 817 ; *Rex v. Lynch*, 5 C. & P. 324 ; *Rex v. Hayward*, 6 C. & P. 157. Words of provocation may be, along with

other cause, an excuse for manslaughter : Russell, pp. 676-7 ; *Regina v. Rothwell*, 12 Cox 145 ; *Regina v. Sherwood*, 1 C. & K. 556 ; *Regina v. Smith*, 4 F. & F. 1066.

*J. R. Cartwright*, Q.C., for the Crown : The learned Chief Justice was right in withdrawing the question of manslaughter from the jury, because the evidence did not shew manslaughter within the language of sec. 229 of the Code.

TORONTO, May 18, 1896.

MEREDITH, C.J.—

The sole question involved in this appeal is as to the correctness of the direction of the learned Chief Justice to the jury that it was not open to them on the evidence to find a verdict of manslaughter.

By sub-sec. 1 of sec. 229 of the Criminal Code it is provided that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

Sub-section 2 deals with the question of provocation, and it provides that "any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool."

Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, are questions of fact (sub-sec. 3).



The provision of sub-sec. 3 which I have quoted is subject to this qualification which is contained in it:

“No one shall be held to give provocation to another by doing that which he had a legal right to do.”

The learned Chief Justice [Armour, C.J.] held that upon the evidence in this case the deceased, Strathy, was, at the time he was shot by the prisoner, doing that which he had a legal right to do, and that there was, therefore, no provocation, and no question of fact to be submitted to the jury to reduce the crime from murder to manslaughter.

I am, with great respect, of opinion that this ruling was erroneous.

Whether or not the deceased at the time he was shot by the prisoner, was doing that which he had a legal right to do depended upon whether, if the jury accepted the statement of the prisoner given in evidence as to the circumstances attending the shooting as true, the deceased had before laying hands upon him ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points.

I extract from the evidence of the witness Greer the following, which was deposed to by him as the prisoner's statement of what immediately preceded the shooting:

“When Strathy came through the glass door, he said—the first words Strathy used were, ‘The devil! Brennan, you here again?’ Then he says, ‘yes, Mr. Strathy, I came here to see about my children, as I understand you know something about them.’ Then Mr. Strathy said, ‘I have told you before that I know nothing about your children or your family, and I don't want you to be bothering me

any more'; to get out of here. And he said he immediately caught him by the coat collar—in fact Brennan caught my collar to shew me how Strathy caught him—and he shoved him out."

According to the evidence of Mr. Drury, the statement of the prisoner to him was that he had no intention of killing any one when he came to Barrie, that he desired to speak to Mr. Strathy, and that the latter was very abrupt with him, and that he (the prisoner) had not gone far with the conversation before Mr. Strathy seized him by the back of the neck and forced him through the door, and that he fell on his hands and knees, and that he at once fell into a dreadful passion—a passion, and he did it, and that that was the reason for the shooting.

And according to the evidence of the witness Marron, who saw the prisoner very soon after the shooting, there was then blood across the knuckles of his left hand, which, according to the prisoner's statement, resulted from the hand coming into contact with the ice or frozen snow when, as he said, he was thrown out of the porch or vestibule by Mr. Strathy.

Had the deceased been the defendant in an action by the prisoner for assault, and had he pleaded that the acts complained of were done by him in defence of his house: Bullen & Leake, 4th ed., vol 2, p. 491: and excess had been replied, would it have been proper on this evidence for the Judge at the trial to have withdrawn the case from the jury and to have directed a verdict for the defendant?

Unless he could properly have done so, and it seems to me clear that he could not, how can the ruling and direction to the jury that the deceased was doing what he had a legal right to do, be supported? It seems to me that it cannot, and that there was a preliminary question of fact to be determined by the jury before it could be said that

the deceased was doing what he had a legal right to do, and that that question should have been submitted to the jury.

Whether the jury would have accepted the prisoner's statement as true, or, if true, would have come to the conclusion that the act of Mr. Strathy amounted to provocation within the meaning of the Code, or if it did amount to provocation, whether it was such as to reduce the crime from murder to manslaughter, are questions not material to the present inquiry. It is sufficient for the disposition of the appeal in favour of the prisoner that there was evidence which, if they accepted as true the prisoner's statement as to the circumstances attending the shooting, was proper to be considered by them for the purpose of determining whether the prisoner's offence should be reduced from murder to manslaughter.

The second question stated in the reserved case must be answered in the affirmative.

As the result of the answer to the second question is that the conviction must be set aside and a new trial had, it is unnecessary to consider the first question submitted. I do not, however, wish to be understood as expressing an opinion adverse to the propriety of a finding, on the whole evidence, of murder.

The case seems to indicate that the point upon which we have decided in favour of the prisoner was not as clearly taken at the trial as it might have been, and the objection to the charge appears to have been directed rather to the question whether the act of the deceased amounted to provocation within the meaning of sub-sec. 2, than to the ruling on the preliminary question whether the deceased, at the time he was shot by the prisoner, was doing that which he had a legal right to do. I cannot,

however, say that the objection to the charge is not wide enough in its terms to cover the point that it was for the jury to say whether the act of the deceased in putting the prisoner out, if he was put out, was accompanied by more violence than was necessary or justifiable for the purpose, so as to make it an unlawful act.

ROSE, J.—

Case stated for the opinion of the Court of Appeal under sec. 744 of the Criminal Code of 1892.

The questions for the opinion of the Court are:

First. Was the prisoner on the evidence properly found guilty of murder?

Second. Was there any misdirection in the charge on the grounds complained of?

The real questions for consideration here are:

First. Was there any evidence to go to the jury of a wrongful act or insult on the part of Mr. Strathy, which might amount to provocation, reducing the offence from culpable homicide to manslaughter within the meaning of sec. 229 of the Code?

Secondly. Did the learned Judge withdraw the consideration of such evidence from the jury?

Another question was raised as to whether the learned Judge should not have directed the jury that in determining whether the act or insult was of such a nature as to deprive the prisoner of the power of self-control, they should consider the peculiar mental and nervous condition of the prisoner as a fact which might make him more liable to provocation and to a sudden rise of passion so as to deprive him of the power of self-control.

Under sec. 229 the question of whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually

deprived of the power of self-control by the provocation which he received, are declared to be questions of fact. And by the same section it is further declared that "no one shall be held to give provocation to another by doing that which he had a legal right to do \* \* \*." The section further declares that "culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by a sudden provocation." Sub-section 2 is: "Any wrongful act or insult, of such nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool."

The evidence relied upon by the prisoner on this appeal was offered by the Crown and was in the nature of statements made to the detective, Greer, and to Sheriff Drury, and the simple point is whether such evidence shewed that in ordering the prisoner off the premises Mr. Strathy acted reasonably, giving him time to go, and upon refusal gently laid his hands on him in order to remove him, doing no more than was necessary for that purpose; or whether Mr. Strathy, upon ordering the prisoner to leave the premises, immediately and without giving him opportunity to do so seized him and threw or forced him out so as to constitute himself a trespasser making an assault upon the prisoner. If Mr. Strathy unnecessarily laid hands upon the prisoner, he was not doing what he had a legal right to do, and it became a question of fact then for the jury whether the act, thus being wrongful, was one which amounted to provocation, and whether by such provocation the prisoner was actually deprived of the power of self-control. I think it is impossible to say that there was no evidence to

go to the jury, to be considered by them, as to the reasonableness of the conduct of Mr. Strathy in taking hold of the prisoner and throwing him out of the door. I do not at all say whether, upon the consideration of such evidence together with all the other evidence in the case, the verdict should be for or against the prisoner; that is not within our province; and in a case of this nature I shall endeavour most carefully to abstain from expressing any opinion whatever upon the evidence or weight of evidence, confining myself solely to the question as to whether there was any evidence to be submitted to the jury.

On page 84 of the notes of evidence I find these words used by the witness Greer as stated to him by the prisoner: "When Strathy came through the glass door, he said—the first words Strathy used were, 'The devil! Brennan, you here again?' Then he says, 'yes, Mr. Strathy, I came here to see about my children, as I understand you know something about them.' Then Mr. Strathy said, 'I have told you before that I know nothing about your children or your family and I don't want you to be bothering me any more'; to get out of here. And he said he *immediately* caught him by the coat collar—in fact Brennan caught my collar to shew me how Strathy caught him, and he shoved him out."

On page 70. Mr. Sheriff Drury gave the following answer to a question put by Mr. Lount: "He said that Mr. Strathy was very impatient with him." "Q. He spoke of having told Mr. Strathy what he had come there for? A. Yes, he said, 'I had got so far in my conversation on the subject when Mr. Strathy seized me by the back of the neck.'

"Q. That he 'had got so far'? A. Yes, the impression he left on my mind was that he had not got very far in his conversation.

"Q. That he had got partly into his conversation about his troubles, about what he had come to see him about, and then Strathy seized him by the back of the neck and did what? A. Forced him out through the door on to the snow.

"Q. Did he not say that Strathy had thrown him down? A. That he had thrown him through the door and he had fallen upon his hands and knees on the snow.

"Q. That he had caught him by the back of the neck and thrown him through the door and he had fallen upon his hands and knees, and then he remembered that he had the pistol and he drew it and fired? A. Yes.

"That he was in a very great passion? A. Yes.

"Q. Did he not say that when he went there he had no intention of hurting anybody, but when Strathy threw him out that way, it put him in a passion? A. Yes, that was the explanation he made of the shooting."

On page 75, in a statement made by the witness Greer, the following language was used:—

"A. He would not listen to Mr. Brennan, and he caught him by the coat collar and told him to get out. He said that he shoved him kind of towards the door, and he reached with his left hand and opened the door, that is, Mr. Strathy did, and shoved him out with his right hand; he still had hold of his coat collar. He said that when he went down off the step of the porch, he slipped and fell on his hands and knees. He said that made him very mad, very angry, and just as he raised up he shot him; he said he pulled the revolver and shot him, and he said, "Take that, God damn you."

If Mr. Strathy had not been shot and Brennan had brought an action for assault against him, and Mr. Strathy had pleaded in the old form of plea as found in Bullen & Leake, "that at the time of the alleged trespasses he was

possessed of a dwelling-house wherein the plaintiff was trespassing and making a noise and disturbance, whereupon the defendant requested the plaintiff to cease from so doing and to leave the said house, which the plaintiff refused to do, and thereupon the defendant gently laid his hands on the plaintiff in order to remove him (and removed him) from the said house, doing no more than was necessary for that purpose, which are the alleged trespasses," could it be said that there was no evidence to leave to a jury upon the issue raised by such defence? It may be that upon review of the whole evidence it ought to be found that such a plea could be sustained, but on the passages which I have above given, I think that the jury must have been directed to consider whether or not force was used before it was necessary and whether the force was more or greater than was necessary.

There was, in my opinion, therefore, evidence to go to the jury that Mr. Strathy was not doing what he had the legal right to do, and if that fact was so found by the jury, that then there was evidence which they must have considered as to whether or not such wrongful act amounted to provocation, and whether the prisoner was actually deprived of the power of self-control by such provocation.

The learned Judge did not leave any such question to the jury. On the contrary, he stated as follows:—

"Now it is said that you ought to reduce the crime from murder to manslaughter. Mr. Strathy ordered him out. He had a right to order him out. A person who comes into your house, comes there by your license. You can revoke that license at any moment. You can tell him to get out, and if he does not get out, you are justified in putting him out. Therefore Mr. Strathy, when he ordered him out and then took hold of him to put him out, was



doing what he had a legal right to do. Therefore there was no provocation to reduce the crime from murder to manslaughter."

In so charging the jury I think the learned Judge was withdrawing from them the consideration of the question which was for them to determine, and so there was misdirection in the charge.

The learned Judge further said, in considering the question of whether or not there was justification in using the weapon, as follows:—

"So that I am bound to tell you that, under the facts proved before you, the prisoner at the bar is guilty of murder."

By this direction it is clear that all consideration of the question of whether or not the facts reduced the charge from culpable homicide to manslaughter was withdrawn from the jury.

Again on page 336: "In the first place, did he shoot Strathy? That is admitted. Counsel admits that, although urging that the crime ought to be reduced to manslaughter. I shewed you reasons why it should not be reduced to manslaughter. In the first place, because Mr. Strathy was within his right in ordering him out and in turning him out if he did not go. And in the next place, because he had no right to use a deadly weapon under the circumstances in which he used it, and having used it in that way, the law implies malice, and he used it intentionally, and the intentional shooting with malice is murder."

The learned Judge left to the jury the question of sanity or insanity, and further directed them: —

"If you think that he was capable of appreciating the nature and quality of the act, and knowing that the act was wrong, then your simple verdict would be 'guilty.'"

It is clear, therefore, that the learned Judge did not

leave to the jury the question of whether or not on the evidence before them the prisoner was guilty of murder or manslaughter.

Mr. Lount's objection was as follows: "Your Lordship told the jury there was no provocation for manslaughter. I submit your Lordship has entirely taken from the jury what is their especial privilege." To which the learned Judge answered: "No; it is a matter of law for me to say whether the man was doing right." Mr. Lount:—"At the same time it is for the jury to determine the facts." His Lordship:—"The facts are not in dispute."

It is not, therefore, in my opinion necessary to determine whether the learned Judge should have directed the jury that in considering whether or not the provocation deprived the prisoner of the power of self-control, they should take into consideration the peculiar mental and nervous condition of the prisoner, as shewn by the evidence. I feel a difficulty upon the wording of the Code in saying that there was any error in the charge in such respect. By sub-sec. 2 of sec. 229, as above quoted, the wrongful act or insult, to amount to provocation, must be of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

By sec. 7 of the Code, "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

Reading the above two sections together, it seems to me that, whatever may have been the law prior to the passing of the Code, it is now open to grave question whether the act must not be such an one as would be sufficient to deprive an ordinary person of the power of self-control,

and that unless the condition of the accused is shewn to be such as to amount to insanity within the meaning of sec. 11 of the Code, it is intended to exclude from consideration the varying moods and conditions, physical or mental, of different persons so as to render any act, which committed by one person would be murder, if committed by another, manslaughter. It may be that if it is shewn that the act was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, then the mental or nervous condition of the accused should be considered in determining whether or not the accused did act upon such provocation on the sudden, and before there had been time for his passion to cool.

I merely indicate the possible construction of the section, as I base my opinion on the first ground as to misdirection, upon which ground I think that the appeal must be allowed and a new trial directed.

MACMAHON, J.—

By sec. 229 of the Criminal Code, "culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

"2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

"3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right

to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person."

According to the above 3rd sub-section, where by the evidence a question arises as to whether a wrongful act or insult amounts to provocation so as to reduce the crime from murder to manslaughter, that question is one of fact, and must be submitted to the jury. Not to do so would be the usurpation by the Judge of the jury's functions.

The nature and extent of an assault which might be considered as sufficient provocation to reduce a homicide from murder to manslaughter was considered by English Judges, at least as early as 1641. Hale's Pleas of the Crown, vol. 1, p. 455, mentions the following cases shewing that an assault of not a serious character may be sufficient provocation to reduce a homicide from murder to manslaughter: "If A. be passing the street, and B. meeting him, (there being convenient distance between A. and the wall,) takes the wall of A. and thereupon A. kills him, this is murder; but if B. had justled A. this justling had been a provocation, and would have made it manslaughter, and so it would be, if A. riding on the road, B. had whipt the horse of A. out of the track, and then A. had alighted, and killed B. it had been manslaughter. 17 Car. 1. *Lanure's case*."

In *Rex v. Hayward*, 6 C. & P. 157, the prisoner was indicted for the murder of John Corser. The facts disclosed that the deceased was requested by his mother to turn the prisoner out of her house, which the deceased after a short struggle with the prisoner, effected, and in doing so gave him one kick. On the latter leaving the house, he said to the deceased, "he would make him remember it," and then went a few hundred yards to his

lodging, where he procured from a pantry a sharp butcher's knife, with which he usually ate, and coming from his lodging he met the deceased, who had followed him down the street to give him his hat, which he had left behind. They talked together, and walked in the direction of the house of prisoner's mother, the deceased desiring the prisoner not to go to his mother's house that night. The deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with the knife in two places, one a mortal wound in the belly. When the prisoner stabbed the deceased a second time, he said he had served him right.

Tindal, C.J., in charging the jury said there could be little doubt that the death of the deceased had been caused by the prisoner having stabbed him; and "the remaining and principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might be considered at the moment not the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which had elapsed between the original quarrel and the stabbing by the prisoner; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place."

In *Regina v. Thomas*, 7 C. & P. 817, the indictment was for maliciously stabbing.

Parke, B., in charging the jury, said: "There is no doubt that whenever death ensues from violence inflicted by the hand of another, the law presumes, *prima facie*, that it is murder; and it must be so treated, unless, upon the evidence for or against the accused, the jury are induced to come to a conclusion that the offence is of a less degree. Here the question would be, if death had ensued, whether it would have been manslaughter. If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things, first that there should be that provocation, and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation," etc.

It is unnecessary that I should refer at length to the charges of other eminent Judges, as shewing the care (I might almost say solicitude) evinced by them, when the evidence disclosed that an assault had been committed, in leaving to the jury the question whether the assault was of such a character as should have furnished provocation, and that the mortal wound was given so recently after the provocation as to reduce the killing from murder to manslaughter. The following cases may be referred to: *Rex v. Kirkham*, 8 C. & P. 115; *Regina v. Sherwood*, 1 C. & K. 556; *Regina v. Smith*, 4 F. & F. 1066.

The evidence of Greer and of Sheriff Drury as to what, according to the statements of the prisoner made to them, happened at Mr. Strathy's house, fully appears in the judgment of my learned brother Rose, and therefore need not

be repeated. But I extract from the charge of the learned Chief Justice the following passages, as shewing how he regarded the evidence of Mr. Strathy's ejection of the prisoner from his house, and his direction to the jury as to how in law that evidence was to be regarded by them. He said:

"He goes to Mr. Strathy's house and is admitted. Mr. Strathy comes down and opens the glass door from the reception room into the vestibule. He was standing in the vestibule, invited in there by the girl who answered the door. Mr. Strathy says, 'The devil! Brennan, are you there again?' Brennan says, 'I came to enquire about my children.' Strathy says, 'I don't know anything about your children, and I told you that before. Now, I want you to go away from here.' He began to remonstrate. I am giving you the evidence as Greer gave it of the prisoner's statement to him. Strathy would not listen to him, took hold of his coat with his left hand, opened the door with his right, and pushed him out. He was unwilling to go. In going out from the vestibule into the porch there is a step; on that he slipped and fell on his hands and knees with his face towards Strathy. He then remembers that he has a revolver in his pocket, he puts his hand in his pocket, draws his revolver, aims it at Strathy, and fires.

"Now, what was the consequence? What offence did he commit in doing that? He intentionally fired at Strathy, and therefore it was an intentional killing of Strathy. From every intentional unlawful killing the law presumes malice. Malice is implied. Malice is always implied in law wherever a person intentionally does a wrongful and unlawful act.

\* \* \* \* \*

"Shooting at Strathy was an unlawful shooting, and a

man is presumed in law to intend the necessary or natural result of his own act. He intended to shoot him. He shot at him, and the law presumes that he intended to kill him. He did kill him. Then, it being an intentional killing of Strathy, the law implies that he did it maliciously.

"Now, it is said that you ought to reduce the crime from murder to manslaughter. Mr. Strathy ordered him out. He had a right to order him out. A person who comes into your house comes there by your license. You can revoke that license at any moment. You can tell him to get out, and if he does not get out, you are justified in putting him out. Therefore, Mr. Strathy, when he ordered him out and then took hold of him to put him out, was doing what he had a legal right to do. Therefore, there was no provocation to reduce the crime from murder to manslaughter.

"But there is another ground. Even if Strathy was unlawfully assaulting the prisoner, the prisoner had no right, under the circumstances, to use a deadly weapon in the manner in which he did. He was out in the porch; Strathy had not hold of him; Strathy had hold of the door; he was out in the porch and all he had to do was to get up and go away. Even when a man is assaulted he cannot use a deadly weapon until he has retreated as far as he can, and being unable to retreat further has to use it for the protection of his own life. So that even if Strathy was in the wrong, which I have told you he was not; he had a right to order him out, and he had a right to put him out; but even if he was in the wrong, the prisoner had no excuse for using a deadly weapon and killing Strathy under the circumstances that occurred. So that I am bound to tell you that under the facts proved before you the prisoner at the bar is guilty of murder."



On an objection to his charge that he had told the jury there was no provocation given which could reduce the crime to manslaughter, and that in so doing he had taken from the jury that which it was their privilege to pass upon, the learned Chief Justice replied, "No, it is a matter of law for me to say whether the man was doing right."

The charge withdrew altogether from the jury the question: If the prisoner having been requested by Mr. Strathy to leave the house, whether time was given him to leave before being ejected; and whether the ejection, which caused the prisoner to fall on the sidewalk, was accompanied with more force than was necessary; and was the provocation thereby given sufficient to deprive the prisoner of the power of self-control; and did he fire the fatal shot while in that condition? This, with a reference to the prisoner having to procure the pistol from an inside pocket, as shewing mental reflection, and, therefore, power to deliberate, would have been a proper direction to the jury, and had they passed upon the question thus raised adversely to the prisoner, no fault could have been found with the verdict.

The questions thus raised not having been submitted to the jury, there was, in my opinion, misdirection on the part of the learned Chief Justice.

On examination, it will be seen that the three sub-sections of section 229 above referred to (with the exception of the words "or insult" in the 2nd and 3rd sub-sections) simply embody in the shape of abstract propositions the rule of the common law as to what is required in order to reduce a homicide from murder to manslaughter.

There being, as I conceive, misdirection in the charge, the trial and conviction of the prisoner must be set aside, and a new trial directed.

*Order for new trial.*

**Note.**—*Murder or Manslaughter—Provocation—Cr. Code, 229.*

Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature; 1 East's Pleas of the Crown, 218; Roscoe's Criminal Evidence, 12th ed., 620. Murder is unlawful homicide *with* malice aforethought; manslaughter is unlawful homicide *without* malice aforethought; *R. v. Doherty* (1887), 16 Cox. C.C. 306.

Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon sudden combat, it will be manslaughter; if there be no such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder; 2 East's Pleas of the Crown, 232; Foster 313; Roscoe's Crim. Evid. 620. Where the provocation is sought by the prisoner it cannot furnish any defence against the charge of murder; 1 East P.C. 239. The provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed; Russell on Crimes, III. 38; Foster 315. As a general rule, no provocation of words will reduce the crime of murder to that of manslaughter; Foster's Crown Law, 290; but under special circumstances there may be such a provocation of words as will have that effect; Russell on Crimes (1896) III. 38. And Blackburn, J., in summing up to the jury in *R. v. Rothwell* (1871), 12 Cox C.C. 145 said that what they would have to consider was, whether the words which were spoken just previous to the blows amounted to such a provocation as would, in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify the prisoner in striking as he did the person who used the words.

Where, however, there are no blows there must be a provocation at least as great as blows; for instance, a man who discovers his wife in the act of adultery and thereupon kills the adulterer is only guilty of manslaughter; Blackburn, J., in *R. v. Rothwell* (1871), 12 Cox C.C. 145, 147. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity; 1 East P.C. 232; Russell on Crimes III. 38. In the United States it has been held that words may give character to acts of menace and so may make an act, otherwise without meaning, an act of provocation which will reduce the subsequent killing to manslaughter; *Watson v. State*, 82 Ala. 10; *State v. Keene*, 50 Mo. 357; *Pridgen v. State*, 31 Tex. 420.

**Note—Continued.**

If there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, it may be regarded as reducing the crime to that of manslaughter; *R. v. Sherwood*, 1 C. & K. 556; *R. v. Smith*, 4 F. & F. 1066.

If on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him; 4 Black. Com. 199, *Halloway's Case*, Cro. Car. 131. Slight provocations have been considered in some cases as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice; but in such cases it must appear that the punishment was not administered with brutal violence, nor greatly disproportionate to the offence, and the instrument must not be such as, from its nature, was likely to endanger life; Foster's Crown Law 291; Russell on Crimes, III. 47.

In *R. v. McDowell* (1865), 25 U.C.Q.B. 108 the rule was stated as follows by the Court of Queen's Bench of Upper Canada (Draper, C.J., Hagarty, J., and Morrison, J.):—

"Mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear or had struck him with a stick or other weapon *not likely to kill*, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter"; 25 U.C.Q.B. at page 112.

But in the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder.

All questions as to motive, intent, heat of blood, etc., must be left to the jury and should not be dealt with as propositions of law; *R. v. McDowell* (1865), 25 U.C.Q.B. 108, 115.

If the circumstances of the case shew that the blow causing the death was given in the heat of passion arising on a sudden provocation and before the passion had time to cool, the inference of malice is rebutted; *R. v. Eagle* (1862), 2 F. & F. 827. As it may be matter of law that a blow is not sufficient to *excuse* homicide, so it may be matter of law that a blow is not sufficient to reduce the defence to manslaughter; or it may be matter of law that it *may* be so, supposing the jury find as a matter of fact that it did produce a passion which, as a matter of law, it was legally sufficient to provoke; 2 F. & F. note (b) pages 831, 832.

## [COURT OF QUEEN'S BENCH QUEBEC.]

CROWN SIDE.

BEFORE ARCHIBALD, J.

## THE QUEEN v. BENHAM.

*Counterfeit coin—Having in possession—Intent—Possession also of trade dollars—Evidence of guilty knowledge—Cr. Code secs. 473, 475.*

1. On a charge of having counterfeit coins in possession, proof that the accused also had in his possession 'trade dollars,' which, although genuine, were not worth their stamped value, and that he had attempted to put them off as worth their stamped value, is not admissible as shewing intent to put off the counterfeit coin.

DECIDED: June 23, 1899.

The prisoner was indicted for having in his possession a counterfeit coin intended to resemble a silver dollar of the United States of America, knowing the same to be counterfeit and intending to put it off.

A large number of genuine trade-dollars issued by the government of the United States were found upon his person when arrested, and the Crown sought to prove that the accused had attempted to put these off as worth one dollar when in fact they were worth sixty cents only.

*Foran*, Q.C., for the prisoner, objected to the evidence as it was essential to prove that the coins offered in evidence of guilty knowledge were themselves counterfeits. *Taylor on Evidence*, sec. 345.

*A. Gordon*, Q.C., for the Crown, contended that attempting to put off the trade-dollars was an offence under article 475 of the Code, and could be proved for the purpose of shewing a guilty knowledge.

HULL, QUE., June 23, 1899.

THE COURT maintained the objection, and instructed the jury to acquit, as no other evidence of guilty knowledge was adduced.

*Prisoner acquitted.*

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., AND STREET, J.

**THE QUEEN v. ROCHE.**

*Summary conviction—Municipal By-law—Description of offence—Costs improperly awarded to magistrate instead of informant—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583 (30).*

1. In order to support a summary conviction under a municipal by-law passed under the transient traders' clauses of the Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583 (30-33), the proceedings must shew either that the accused is a transient trader or that he occupied premises in the municipality for a temporary period.
2. The award of costs under a summary conviction should direct payment thereof to the informant and not to the justice.

ARGUED: June 8, 1900.

DECIDED: June 13, 1900.

Motion to quash a summary conviction made under the Ontario Municipal Act, R.S.O. 1897, c. 223.

The defendant was, on the 30th March, 1900, at Barrie, in the county of Simcoe, convicted before a justice of the peace for that county for that she did on the 9th day of March, A.D. 1900, and at other times since the said date, occupy premises in the said town of Barrie under the firm name of "Danford Roche & Co.," and did carry on business on said premises by selling dry goods in a certain store in Dunlop street, Barrie; the said defendant, in her own name or under the name of Danford Roche & Co., not being entered on the assessment roll of the town of Barrie for either income or personal property for the current year, and not having a transient trader's license to do business in said town of Barrie, as required by by-law No. 430 of the by-laws of the said town of Barrie; and was adjudged for her said offence to forfeit and pay the

sum of \$50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the said justice the sum of \$11.45 for his costs in that behalf; and if the said several sums were not paid forthwith, she was adjudged to be imprisoned in the common gaol of the said county, at Barrie, in the said county of Simcoe, for the term of twenty-one days.

This conviction having been brought before the Court on certiorari, the defendant obtained an order nisi calling upon the prosecutor and the convicting justice to shew cause why the same should not be quashed, with costs to be paid by them, or by one of them, to the defendant, upon the following grounds:—

1. The evidence does not shew and the conviction does not find or charge that the said defendant was a transient trader or other person who occupied premises in the said town of Barrie for a temporary period.

2. The evidence shews that the defendant is lessee for a year, renewable, of the premises held by her, and that the same have been held since 1st August, 1899, and that if her name was not on the assessment roll for 1900 of the town of Barrie, it was through no fault of hers, but in consequence of the plan or contrivance of the informant and the town assessor, and in breach of their duty, and for the express purpose of procuring the conviction of the defendant, during March, 1900, of an alleged offence under said by-law.

3. The by-law for offending against which the conviction is made is illegal and not capable of being enforced because not limited to transient traders or other persons occupying premises in the municipality for temporary periods.

4. The information was not laid within six months after the matter of the complaint arose.

5. The conviction does not negative the exception in the statute and by-law of the sale of an insolvent estate.

6. The evidence shews the defendant is a married woman, and such an one cannot be imprisoned in default of distress.

TORONTO, June 8, 1900.

*F. J. Roche* moved absolute the order nisi and cited *Regina v. Smith* (1899), 3 Can. Cr. Cas. 383, 31 O.R. 224; *Regina v. Applebe* (1899), 30 O.R. 623; *Regina v. Langley* (1899), 31 O.R. 295; *Regina v. Caton* (1888), 16 O.R. 11; *Regina v. Cuthbert* (1880), 45 U.C.R. 19, 24.

*G. W. Lount*, for the complainant, referred to *Regina v. Coulson* (1896), 27 O.R. 59, 62, 1 Can. Cr. Cas. 118.

TORONTO, June 13, 1900.

The judgment of the Court was delivered by

ARMOUR, C.J.—

I do not think that this conviction can be upheld.

The first clause of the by-law provides that “every transient trader who occupies premises in the municipality of the town of Barrie and who is not entered on the assessment roll of said municipality, or who may be entered for the first time in the assessment roll of such municipality, in respect of income or personal property, and who may offer goods or merchandize of any description for sale by auction or in any other manner conducted by himself or by a licensed auctioneer or by his agent or otherwise, shall before commencing to trade first take out a license from the said municipality.”

And the second clause provides that “every other

person who occupies premises in the municipality of the town of Barrie for a temporary period, and whose name has not been duly entered on the assessment roll in respect of income or personal property for the then current year, and who may offer goods or merchandize of any description for sale by auction or in any other manner conducted by himself or by a licensed auctioneer or otherwise, shall before commencing to trade take out a license from the said municipality."

And the third clause provides that "every transient trader and every such other person shall before commencing to trade take out a license therefor from the said municipality, and shall pay by way of said license the sum of fifty dollars."

And the eighth clause provides that "any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding the sum of fifty dollars for each offence, exclusive of costs, and in default of payment of the said penalty and costs, or costs only, forthwith, the said penalty and costs, or costs only, may be levied by distress and sale of the goods and chattels of the offender, and in case of there being no distress found out of which such penalty can be levied, the convicting magistrate may commit the offender to the common gaol of the county of Simcoe, with or without hard labour, for any period not exceeding twenty-one days, unless the said penalty and costs be sooner paid."

It is not alleged or charged that the defendant was a transient trader, and so the defendant is not brought within the first clause of the by-law.

And it is not alleged or charged that the defendant occupied premises in the municipality of the town of



Barrie for a temporary period, and so the defendant is not brought within the second clause of the by-law.

A like objection was held to be fatal to the conviction in *Regina v. Caton* (1888), 16 Ont. R. 11.

The conviction is also open to objection on the ground of the application of the penalty, the award of the costs to the justice instead of to the informant, and in awarding imprisonment upon default in payment of the penalty, instead of directing the penalty to be levied by distress, and in default of sufficient distress awarding imprisonment.

The order nisi must, therefore, be made absolute quashing the conviction, with costs to be paid by the informant.

*Conviction quashed.*

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE ARCHIBALD, J.

## THE QUEEN V. GARNEAU.

*Incest—Proof of relationship—Provincial laws of evidence—Quebec civil law—Extracts from registers—Exclusion of oral testimony—Canada Evidence Act, sec. 21—Cr. Code, sec. 176.*

1. **Oral** evidence is not admissible to prove relationship on a charge of incest in the province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 21, unless the absence of such registers is proved.
2. It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed.

**DECIDED :** June 24, 1899.

The indictment contained four counts—two alleging that the prisoner had had sexual intercourse with his grandchild, knowing her to be such, and two charging him with indecent assault. The only evidence of the relationship alleged to exist between the parties was the statement of the girl, in her testimony, that the accused was her grandfather, and the testimony of Thomas Garneau that she was the prisoner's grandchild.

*Foran*, Q.C., for the prisoner, requested the Court to instruct the jury that no sufficient legal evidence of an incest had been adduced inasmuch as by the civil law the proof of the relationship could be established by the production of extracts from the registers of civil status only, and not by parol testimony, where the absence of such registers was not proved.

*A. Gordon*, Q.C., for the Crown, maintained that parol testimony sufficed; *Regina v. Manwaring*, Dears. C.C.,

132; and furthermore, that the defence was too late in objecting to the illegality of the evidence; *Paige v. Ponton*, 26 L.C.J., 155.

HULL, QUE., June 24, 1899.

THE COURT held that inasmuch as by section 21 of the Canada Evidence Act, the laws in force in the Province applied to the proceedings, the testimony of witnesses was insufficient, and accordingly instructed the jury that no case of incest had been made out against the accused; moreover, that it was not too late for the accused in a criminal trial to object to the insufficiency of the evidence when the Crown had closed its case.

*Verdict of indecent assault.*

**Note:** *Proof of relationship—Registers of marriages, etc. in Quebec Province*  
—“*Acts of civil status.*”

The laws of Lower Canada relative to persons are declared, by the Quebec Civil Code, article 6, to apply to all persons being in that province, even to those not domiciled there, subject as to the latter to the following exception—that an inhabitant of Lower Canada so long as he retains his domicile therein is governed even when absent by its laws respecting the status and capacity of persons (C.C. 6.) The term “acts of civil status” in Quebec law means the entries made in the registers kept according to law to establish births, marriages and burials, and the books so kept and in which the acts are entered are known as the “registers of civil status”. Quebec Civil Code article 17 (22). The registers are kept by the rector, curate, priest or minister having charge of the churches, congregations, or religious communities, or by any other officer entitled so to do. Civil Code article 44.

The “acts of civil status” are inscribed in two registers of the same tenor, kept for each Roman Catholic parish church, private chapel or mission, and for each Protestant church or congregation, or other religious community entitled by law to keep such registers, each of which is authentic—i.e., admissible in evidence—and has in law equal authority. Civil Code art. 42; R.S.Q. art. 5777. 36 Vict. (Que.) c. 16, s. 1. The ‘acts’ are inscribed in the duplicate registers in successive order and without blanks, and each year the custodian of the duplicate

*Note—Continued.*

registers must deposit one of the duplicates in the office of the prothonotary of the Superior Court of the district in which the registers were kept. Civil Code articles 46 and 47. The depository of either of the registers is bound to give extracts thereof to any person who may require the same; and such extracts being certified and signed by him are authentic—i.e., admissible in evidence. Civil Code art. 50. It is also provided by the Civil Code that, on proof that in any parish or religious community no registers have been kept or that they are lost, the births, marriages and deaths may be proved either by family registers and papers or other writings, or by witnesses (art. 51).

By the laws of England adopted in the other provinces of Canada the fact of a marriage may be proved by a person who was present, and it is not necessary to produce the register as the primary evidence. *Morris v. Miller*, 1 W. Bl. 632; *R. v. Allison*, Russ. & Ry. 109; *Manwaring's Case* (1856), 1 Dearsly & B. 132, 137. And even where the register is proved, some evidence must be given of the identity of the parties. *Birt v. Barlow*, 1 Doug. 170 (a). This may be done by proof of the handwriting where the parties have signed the register, and it is not necessary that the witness called for that purpose should be one of the subscribing witnesses to the register. *Ibid.*

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## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

## THE QUEEN v. HOLLAND.

*Provincial Insurance Company doing business in another province — Fire Insurance—Necessity of license under Insurance Act (Can.)—Conviction of agent of unlicensed company—Constitutionality of Insurance Act, R. S. C. 1886, c. 124—Stated case—Cr. Code, 900.*

1. An insurance company incorporated under the provisions of a provincial law is not entitled to carry on a fire insurance business in another province without being registered or licensed under the laws of such other province or of the Dominion of Canada.
2. The person who manages and carries on the business of such unregistered and unlicensed insurance company in a province other than that by which it was incorporated is liable to summary conviction therefor under the provisions of the "Insurance Act" of Canada, R. S. C. 1886, c. 124, s. 22.
3. The "Insurance Act" of Canada is intra vires of the Parliament of Canada as regards the provisions thereof controlling provincial companies doing business in Canada outside of the limits of the province under the laws of which they were incorporated.

DECIDED: June 21, 1900.

Appeal by way of case stated from a conviction of W. S. Holland by Joseph A. Russell, Police Magistrate of the City of Vancouver.

The case stated was as follows:

On the 29th of December, 1899, the defendant, W. S. Holland, was convicted before me the undersigned Police Magistrate in and for the City of Vancouver, for that he the said W. S. Holland did on or about the 28th day of October, 1899, at the said City of Vancouver, carry on the business of insurance on behalf of the Equity Fire Insurance Company, a Company not incorporated by an Act of the Legislature of the late Province of Canada, nor licensed nor registered under an Act of the Legislature of the Province of British Columbia, without having first obtained

a license from the Minister of Finance and Receiver-General of Canada to carry on such business in Canada, contrary to the form of the statute in such case made and provided.

“The defendant was at the time of the alleged offence and is one of the firm of Fred J. Holland & Co., the duly authorized agents of the said Insurance Company to carry on its business in Vancouver.

“The said Company was not at the said time nor yet is either registered or licensed under any British Columbia statute, nor otherwise registered or licensed under the provisions of the Insurance Act of Canada.

“The defendant was convicted by me as aforesaid under the provisions of Chapter 124 of the Revised Statutes of Canada (1886), being the Insurance Act of Canada, and now desires to take the opinion of this Honourable Court on the constitutionality thereof.

“If the provisions thereof are ultra vires of the said Parliament so far as aforesaid, the conviction is to be quashed; otherwise affirmed.

“Dated the 20th day of January, 1900.

“(Sgd) Joseph A. Russell,

“Police Magistrate.

By the Insurance Act, R.S.C. 1886, c. 124, it is enacted as follows:

3. The provisions of this Act shall not apply,—

(a.) To any company transacting, in Canada, ocean marine insurance exclusively; or—

(b.) To any policy of life insurance in Canada, issued previously to the twenty-second day of May, in the year one thousand eight hundred and eighty-eight, by any company which has not subsequently received a license; or—

(c.) To any company incorporated by an Act of the legislature of the late Province of Canada, or by an Act of

the legislature of any Province now forming part of Canada which carries on the business of insurance wholly within the limits of that Province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such Province; but any such company may, by leave of the Governor in Council, on complying with the provisions of this Act, avail itself of the provisions of this Act, and, if it so avails itself, the provisions of this Act shall thereafter apply to it, and such company shall have the power of transacting its business of insurance throughout Canada. (As amended by 51 Vict. c. 28).

4. No company or person, except as hereinafter provided, shall accept any risk or issue any policy of fire or inland marine insurance or policy of life insurance, or grant any annuity on a life or lives, or receive any premium, or carry on any business of life or fire or inland marine insurance, in Canada,—or prosecute or maintain any suit, action, or proceeding, either at law or in equity, or file any claim in insolvency relating to such business, without first obtaining a license from the Minister [the Minister of Finance and Receiver-General of Canada] to carry on such business in Canada.

22. Every person who delivers any policy of insurance, or interim receipt, or who collects any premium (except only on policies of life insurance issued to persons not resident in Canada at the time of issue) or *carries on any business* of insurance on behalf of any *life, fire or inland marine* insurance company, without such license as aforesaid, shall, on summary conviction thereof, before any two justices of the peace or any magistrate having the powers of two justices of the peace, for a first offence, incur a penalty not exceeding fifty dollars and costs, and not less than twenty dollars and costs; and in default of payment the

offender shall be liable to imprisonment with or without hard labour for a term not exceeding three months and not less than one month; and for a second or any subsequent offence such offender shall be imprisoned with hard labour for a term not exceeding six months and not less than three months:

2. One-half of any such penalty, when recovered, shall belong to Her Majesty, and the other half thereof to the informer.

23. All informations or complaints for the prosecution of offences under the provisions of sections twenty-two, twenty-five and forty-two of this Act, shall be laid or made in writing within one year after the commission of the offence.

*Hunter*, for appellant: We are entitled to carry on business in this Province under the comity doctrine, subject only to any laws the Province may make: *Duff v. Canadian Mutual Fire Insurance Co.* (1880), 27 Gr. 410, affirmed (1881), 6 Ont. App. 238; *Canadian Pacific Railway Company v. The Western Union Telegraph Company* (1889), 17 Can. S. C. R. 155. at p. 167; Lindley on Companies, 5th Ed., 910; *Clarke v. Union Fire Insurance Company* (1883), 10 Ont. Pr. 313.

If the Dominion is held to have power to interfere with us it must follow that it can make a law to regulate the carrying on of all other business in the Province, *e.g.*, to compel a dry goods merchant with headquarters at Montreal to take out a license to do business in British Columbia. But in *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, there is an explicit statement that the Dominion can not make regulations regarding a particular kind of business under the trade and commerce clause, but only general regulations.



To carry on a particular trade or business in the Province is clearly a civil right within the Province and the onus is on the other side to shew that the Dominion has the power to interfere, and the particular subhead must be pointed out: *Per* Lord Selborne in *L'Union St. Jacques de Montreal v. Dame Julie Belisle* (1874) L.R. 6 P.C. at p. 36.

The Attorney-General of Canada had been notified of the hearing of the stated case, but did not appear.

*Peters, Q.C.*, and *A. E. McPhillips*, for the private prosecutors, contended that the fact that from 1868 down to the present time statutes had been passed by the Dominion Legislature dealing with the regulating of insurance companies, and granting licenses, without any question being raised, shewed a general consensus of opinion that such legislation was within the authority of the Dominion Legislature. The following Dominion Statutes dealing with insurance were referred to: (1868), Cap. 48; (1871), Cap. 9; (1874), Cap. 48; 1875), Caps. 20 and 21; (1877), Cap. 42; (1878), Cap. 21; (1885), Cap. 49; (1886), Cap. 45; (1894), Cap. 20; (1895), Caps. 19 and 20.

They further contended that insurance was now an absolute necessity in the carrying on of almost all trade and commerce, and therefore came fairly within the authority given to the Dominion legislature to regulate trade and commerce; that while the local Legislature had certain power with regard to insurance companies (such as the right to tax them for local purposes, and the right to regulate the form of contract they should enter into) it was not inconsistent with the right of the Dominion legislature to deal with insurance companies from a national point of view. The principle that the subject matter may from one point of view come within the jurisdiction of the local Legislature, and from another point of view may come

within the jurisdiction of the Dominion legislature, applies to this case. They also referred to the following cases: *Valin v. Langlois*, (1879), 1 Cartw. 161; *Lenoir v. Ritchie* (1879), 1 Cartw. 511; *Hodge v. The Queen* (1883), 3 Cartw. 177; *Regina v. Watson* (1890), 4 Cartw. 593; *Attorney-General for Ontario v. Attorney-General for the Dominion and The Distillers' and Brewers' Association of Ontario*, [1896] A.C. 348 (prohibition case); *Edgar v. The Central Bank of Canada* (1888), 4 Cartw. 541; *Charles Russell v. The Queen* (1882), 2 Cartw. 22; *The Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 and (1881), 1 Cartw. 306; *Cushing v. Dupuy* (1880), 5 App. Cas. 408, 415; *Tennant v. The Union Bank of Canada* [1894], A.C. 31 at p. 46, and *Doutre's Constitution of Canada* p. 265.

*Hunter*, in reply: The power to deal with prohibition is expressly referred to the good government clause and not to the trade and commerce clause.

VICTORIA, B.C., June 21, 1900.

DRAKE, J.—

This is a special case, and the only point argued was that the provisions of Cap. 124, Revised Statutes of Canada, and amending Acts, as far as relate to the necessity of taking out a license to carry on a fire insurance business outside of the Province of Ontario, where the Equity Fire Insurance Company was incorporated, are ultra vires the Dominion Parliament. The Attorney-General for the Dominion has been notified in pursuance of section 100 of Cap. 56 of the Revised Statutes of British Columbia, but does not appear.

The Insurance Act does not apply to any company carrying on business exclusively within the Province by

the Legislature of which it was incorporated, but it assumes to apply to all companies doing business elsewhere in Canada as in section 3 mentioned. The Company in question attempted to do business in the Province of British Columbia without complying with the conditions of the Insurance Act as to deposit of security and license. The question here raised has never been directly adjudicated upon, although the Act has been in force in principle since confederation.

Mr. Hunter for the appellant contends that the right to carry on an insurance business falls within the powers reserved to the Provincial Legislature by the British North America Act, and comes under the heading of 'property and civil rights.' Sections 91 and 92 of the Act must be read together in order to ascertain the respective powers of the different Legislatures. In sub-section 29 of section 91 the Dominion Legislature has no control over the classes of subjects assigned exclusively to the Provinces. By sub-section 11 of section 92 the incorporation of companies with provincial objects is one of the subjects exclusively assigned to the Provincial Legislatures. This would indicate that the incorporation of companies with powers greater than merely provincial objects does not belong to the Provincial Legislatures, but in order to avoid any question on this head, section 91 says the Dominion Parliament may make laws in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislature of the Province; and as the formation of companies with extra-provincial powers is not given to the Provincial Legislatures this power must be held as falling within the above general words. But the appellant contends that a fire insurance company is a trading company, and falls within the term 'property and civil rights.' This term in its largest sense would undoubtedly include the

incorporation of insurance and other companies within the Province, in fact there is hardly any legislation that would not in a sense affect property and civil rights. The regulation of trade and commerce, navigation and shipping, weights and measures, and a variety of other subjects expressly reserved to the Dominion Parliament, all affect property and civil rights. The term, therefore, must be restricted to such property and civil rights as are not subject to Dominion legislation, and which are purely local.

The contention is that admitting the Dominion has power to incorporate companies to do business all over the Dominion, the power to do that business is vested in the Provinces.

I think it clear that the Provinces have the power to impose conditions on companies doing business within their territorial limits, but this power does not restrict the paramount authority of the Dominion to impose their own conditions on companies who wish to carry on business over other parts of the Dominion than the particular Province which granted them their charter. In the exhaustive judgment of the Privy Council in *The Citizens Insurance Company of Canada v. Parsons* (1881), 1 Cartw. 265, these sections 91 and 92 are discussed; and it is there pointed out that no rule can be laid down to define the actual limits of the various powers given to the Dominion and Provinces respectively.

The powers overlap, and in some instances the Provinces can legislate until the subject matter is dealt with as a whole by the Dominion. When this takes place Provincial legislation has to give way to the Dominion. One instance cited is "bankruptcy and insolvency" which is expressly reserved to the Dominion, but until this subject is dealt with by that Legislature, the Provinces can and have legislated on matters nearly connected with insolvency, such as

assignments for benefit of creditors and fraudulent preferences. The judgment further deals with the regulation of trade and commerce, but carefully refrains from any definition of the powers of the Dominion Parliament in this direction, and points out that this power does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as fire insurance in a single Province, and therefore does not conflict or compete with the provincial power over property and civil rights assigned by sub-section 13 of section 92 to the Provinces. The judgment then discusses the Insurance Act, and it nowhere suggests that this Act was beyond the competence of the Dominion Parliament. It points out that assuming the Act to be within the competence of the Dominion as a general law applicable to foreign and domestic corporations, it in no way interferes with the provincial powers to regulate the contracts which corporations may enter into in the Provinces.

Although the Privy Council do not absolutely lay down the proposition that the Insurance Act is a valid exercise of the powers of the Dominion Parliament, because that point was not before them for decision, yet I think there is a strong indication that when a general Act affecting the whole Dominion is passed which affects trade and commerce (and insurance is undoubtedly of such a character) that such an Act would not be held invalid because it in some slight degree affects corporations which have been incorporated by Provincial Legislatures, but only when such companies attempt to exercise their powers beyond the limits of the Province incorporating them.

And this brings me to the further argument raised by Mr. Hunter that by the comity of nations foreign companies are not precluded from carrying on their business

wherever they please ; but a foreign company is bound by the *lex loci*, and although entitled to carry on business outside of the country of its incorporation if not prohibited by its charter, it is always subject to the restrictions and laws enforced in the country where it establishes itself. But although the Company in question may be entitled to do business in this Province, that right is subject to compliance with the conditions imposed by the Dominion in such a case. In the case of the *Attorney-General for Ontario v. Attorney-General for the Dominion, and The Distillers' and Brewers' Association of Ontario*, [1896] A.C. 348, the subject of the conflict of powers which might arise under sections 91 and 92 was greatly discussed, and it was laid down that the Dominion had no authority to encroach upon any class of subjects exclusively assigned to the Provinces ; it was also pointed out that if it were once conceded that the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each Province were substantially of local and private interest, upon the assumption that these matters also concerned the peace, order and good government of the Dominion, there was hardly a subject in section 92 on which they might not legislate to the exclusion of the Provincial Legislatures.

I do not think that the Act now in question can be said to infringe on matters exclusively assigned to the Provinces, or that it infringes on the Provincial powers to incorporate companies with provincial objects. In my opinion the Act objected to is within the power of the Dominion Parliament, and the conviction was right.

*Conviction affirmed.*

## [COURT OF APPEAL FOR ONTARIO.]

BEFORE SIR GEORGE WILLIAM BURTON, CHIEF JUSTICE OF  
ONTARIO, AND OSLER, MACLENNAN, MOSS AND LISTER,  
JUSTICES OF APPEAL.

**THE QUEEN v. MURDOCK.**

*Habeas corpus—Certiorari in aid—Power to amend summary conviction returned—Bringing spirituous liquors on Indian Reserve—Indian Act (Can.) secs. 94, 135—Cr. Code secs. 872, 883, 889.*

1. If on the return to a certiorari the Court is satisfied upon a perusal of the depositions that an offence of the nature described in the summary conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions, and may vary, confirm, reverse or modify the decision of the justice.
2. Where the original conviction directed payment of a fine and the levy of same by distress and in default of sufficient distress adjudged imprisonment, the Court exercising the power of amendment conferred by Code secs. 883 and 889 may substitute in lieu of the distress, etc., an award of imprisonment forthwith in case of non-payment of the fine.
3. The Court has power to so amend a summary conviction returned on certiorari whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus.

ARGUED : May 15, 1900.

DECIDED : June 29, 1900.

Appeal by the prisoner from the judgment of STREET, J., remanding the prisoner to custody, upon his application for discharge made upon the return of a writ of habeas corpus.

*E. E. A. DuVernet*, for the prisoner.

The Crown was not represented.

TORONTO, June 29, 1900.

The judgment of the Court was delivered by

OSLER, J.A.—

On an information laid before Hugh Stewart, a justice

of the peace and Indian agent at the Grand River Reservation, the prisoner was, on the 18th of September, 1897, convicted by and before the Indian agent "for that on the 16th September, 1897, he did take and bring on the Grand River Reservation spirituous liquors and did dispose of the same contrary to the provisions of the Indian Act." And he was adjudged for his said offence to be imprisoned in the common gaol of the County of Haldimand with hard labour for the term of six months. And he was also adjudged "to pay to the Department of Indian Affairs the sum of \$50 and \$5 for costs in this behalf, and if the said sums for costs (*sic*) are not paid forthwith (or on or before the 29th September inst.) then I order that the said sum be levied by distress and sale of the goods and chattels of the said Joseph Murdock, and in default of sufficient distress I adjudge the said Joseph Murdock to be imprisoned in the said common gaol and kept there at hard labour for the term of six months, to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs (*sic*) is sooner paid."

The information, depositions, and conviction, were returned upon a writ of certiorari issued in aid of a writ of habeas corpus. The gaoler's return to the latter writ shewed as cause of detention a warrant of commitment in the form of "warrant of commitment upon a conviction for a penalty," reciting a conviction for the offence as above described, and for a fine of \$50 and \$5 costs to be paid forthwith, and if not so paid, imprisonment for six months in the common gaol of Haldimand unless the said sums were sooner paid, and stating default in payment, but saying nothing of the penalty of imprisonment, or of imprisonment for non-payment of the fine in case of insufficient distress. The proceedings having been brought up on the return to the writs of habeas corpus and



certiorari, the learned Judge, as we were told, at first ordered the prisoner to be discharged in consequence of the manifold defects in the conviction and commitment, but on further consideration determined to amend the conviction, and therefore ordered the prisoner to be remanded. The learned Judge's order, which is drawn up on reading "the answer" to the writ of habeas corpus and the warrant of commitment attached thereto, the conviction, depositions, and return to the writ of certiorari issued in aid, and the affidavits and papers filed on the application for the said writs, is in the following terms:—

"It is ordered that in lieu of the offence mentioned in the said conviction the said Joseph Murdock be convicted for that he did on the 16th September, 1897, give a quantity of whiskey, being an intoxicant, to one Melinda Ann Morton on the Indian Reserve, called the Grand River Reservation, in the Township of Oneida in the County of Haldimand, and that the said conviction be amended accordingly. 2. It is further ordered that the said conviction be amended by adjudging that the said Joseph Murdock for his said offence be imprisoned in the common gaol of the said county and there be kept at hard labour for the term of six months, and that the said Joseph Murdock do forfeit and pay the sum of \$50 and \$5 costs of this prosecution, to be forthwith paid and applied according to law, and that in default of payment of the said fine and costs the said Joseph Murdock be imprisoned for a further term of three months, to begin at the expiration of said term of six months, unless the said several sums and the costs of committing and conveying to gaol be sooner paid."

The order concludes by directing the prisoner to be remanded into the custody of the Warden of the Central Prison (the officer to whom the habeas corpus had been

directed) and that the process of the Court be issued for the purpose of enforcing the said conviction and order.

The motion for the prisoner's discharge upon the habeas corpus was renewed on the appeal on the ground of the defects apparent in the conviction and commitment, and it was further contended that the learned Judge had exceeded his powers in ordering the conviction to be amended or that he ought not to have amended it.

The 94th section of the Indian Act, R.S.C. ch. 43, substituted for the original 94th section by 51 Vict. ch. 22 s. 4 (Can.), enacts that "every one who . . . directly or indirectly on any pretence or by any device sells, barter, supplies, or gives to any *Indian* or non-treaty Indian any intoxicant . . . or who sells, barter, supplies, or gives to any *person* on any reserve or special reserve any intoxicant, shall, on summary conviction before any judge, police magistrate, stipendiary magistrate, or two justices of the peace or Indian agent, upon the evidence of one credible witness other than the informer or prosecutor . . . be liable (1) to imprisonment for a term not exceeding six months and not less than one month, *with or without hard labour*; or (2) to a penalty not exceeding \$300 and not less than \$50 with costs of prosecution; or (3) he shall be liable to both penalty and imprisonment in the discretion of the convicting judge, magistrate, etc."

The interpretation clause of the Act, s. 2, enacts that "unless the context otherwise requires: (c) The expression 'person' means any individual other than an Indian; . . . (h) The expression 'Indian' means: *First*, Any male person of Indian blood reputed to belong to a particular band; *Secondly*, Any child of such person; *Thirdly*, Any woman who is or was lawfully married to such person. (i) The expression 'non-treaty Indian'

means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even if such person is only a temporary resident in Canada."

In section 94, therefore, the expression "any person" means any individual other than an Indian, and thus, by force of other clauses of the interpretation section, includes a white man, woman, or child, a non-treaty Indian, and perhaps an enfranchised Indian, and as "Indian" includes any male person of Indian blood reputed to belong to a particular band, and his wife and children, all classes are practically within what may be called the prohibition of the section which as to "Indians" is absolute, and as to all others restricted to the selling, giving, etc., on the reserve.

The evidence, it may be said, amply proves that the defendant had given an intoxicant (as defined by clause (n) of the interpretation section) to one Melinda Ann Morton, the wife of one Henry Morton, on the Indian Reserve, then known as the Grand River Reservation, in the Township of Oneida, in the County of Haldimand. Whether she was an "Indian" within the meaning of that section was not proved, but if she was not, she was nevertheless a "person" within the meaning of the section, and therefore, the intoxicant having been given to her on the Reserve, an offence was proved within section 94. This, no doubt, was what the magistrate intended to convict for, though he did not use the very words of the section in describing the offence, saying instead that the defendant "did take and bring on the Grand River Reservation spirituous liquors and did dispose of the same contrary to the provisions of the Indian Act."

This error was, in my opinion, having regard to the evidence, clearly amendable under the section of the

Criminal Code, which I shall afterwards refer to. In adjudicating upon the punishment, the magistrate, as we have seen, had power in his discretion to impose, as he did, both fine and imprisonment, and, as incident to the pecuniary penalty, the costs of the prosecution. In this respect there is no error in the conviction. The mistake occurred in the adjudication of the method of raising or levying the penalty. The 94th section of the Indian Act makes no provision for this.

Section 872 of the Criminal Code, 1892 (55-56 Vict. ch. 29) enacts that "whenever a conviction adjudges a pecuniary penalty, . . . whether the Act authorizing such conviction does or does not provide a mode of raising or levying the penalty . . . or of enforcing the payment thereof, the justice by his conviction after adjudging payment of such penalty . . . with or without costs, may adjudge: (a)—1. That in default of payment forthwith, or within a limited time, such penalty shall be levied by distress and sale of the goods of the defendant; and 2. If sufficient distress cannot be found, that the defendant be *imprisoned* in the manner and for the time directed by the Act authorizing such conviction or by this Act (*i.e.*, the Criminal Code), or for any period *not exceeding three months*, if the Act authorizing the conviction does not specify imprisonment or does not specify any term of imprisonment, unless the penalty and costs (if costs are ordered) are sooner paid: or (b) That in default of payment of the penalty and costs (if any), forthwith or within a limited time, the defendant be *imprisoned* in the manner and for the time mentioned in the 'Act under which the conviction is made' or for any period *not exceeding three months* if the Act does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums (*i.e.*, penalty and costs) are sooner paid."

Sub-section 3 of section 872 also provides that where both fine and imprisonment are adjudged, the justice may in his discretion order that the imprisonment in default of distress or of payment shall commence at the expiration of the imprisonment awarded as a punishment for the offence: *Regina v. Cutbush* (1867), L.R. 2 Q.B. 379; *Regina v. Castro* (1880), 5 Q.B.D. 490.

In the exercise of his discretion the magistrate, instead of directly adjudging imprisonment in default of payment, appears to have intended to adopt the other alternative and to order the penalty and costs to be recovered by distress, and in default of distress, imprisonment. The printed form used, however, erroneously provides that "if the said sums for costs are not paid . . . then I order that the said sum be levied by distress and sale, etc." And the term of six months' imprisonment in default of distress is imposed, which, if the magistrate's only authority is in section 872 of the Code, exceeds by three months the term mentioned therein. Of the commitment, it is sufficient to say that it is not supported by the conviction, being simply a commitment for six months (*unless* sooner paid) for non-payment of a pecuniary penalty, saying nothing of the imprisonment adjudged for the offence nor of default of distress.

This was certainly not to the defendant's disadvantage.

The same may be said of the defect in the conviction in adjudicating distress for non-payment of the costs only, and in default of sufficient distress for the costs, then imprisonment for the term specified unless both sums—the penalty and costs—are sooner paid.

But this was also an amendable defect as I shall show.

It was said that there was no power to impose more than three months' imprisonment for non-payment of the fine or in default of distress, and if section 872 of the

Code were the only provision on the subject that would no doubt be the case. That section, however, refers to the Act under which the conviction is made, and it is only where that Act is silent as to the term of the imprisonment that section 872 (b) necessarily comes into play. Among the numerous amendments which have been made to the Indian Act is that of 53 Vict. ch. 29 (Can.), by section 10 of which a section 135 and other sections are added to the Indian Act. That section enacts that "any offender sentenced by a magistrate or Indian agent under any provision of this Act or of any amendment thereof, to the payment of a penalty or of costs, or of both, shall, in default of payment, be liable to *imprisonment*, notwithstanding that such provision does not expressly authorize such imprisonment to be imposed in the event of non-payment of the penalty; but the term of such imprisonment shall not exceed that to which the offender may be sentenced for the offence."

Under this section, therefore, the magistrate could probably have adjudged the defendant to be imprisoned for six months in default of payment of the pecuniary penalty, that being the maximum period to which he might have been sentenced for the offence. On the other hand, as he adjudged the penalty to be levied by distress, and imposed imprisonment only in default of sufficient distress, I think that the maximum he could legally have imposed in that case was three months, because the Act under which the conviction was made makes no provision for enforcing payment of the penalty in that manner, and section 872 (a) is alone to be regarded.

The conviction is, therefore, erroneous in this respect also.

Then as to the power to amend the conviction. This is now much more extensive than it formerly was. By

section 889 of the Criminal Code, when a conviction has been removed by certiorari, it is not to be held invalid for any irregularity, informality, or insufficiency therein, if the Court or judge before whom the question is raised is, upon a perusal of the depositions, satisfied that an offence of the nature described in the conviction has been committed over which the justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence; and "even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made," the Court or judge is declared to have, in Ontario, "the like powers in all respects to deal with the case as seems just, as are by section 883 conferred" upon the Court of General Sessions of the Peace upon an appeal thereto against the conviction.

These extensive powers of dealing with a conviction brought up on certiorari were first conferred by 53 Vict. ch. 37, s. 27 (Can.), up to which time the Court had never felt itself at liberty to interfere where any part of the punishment awarded or the method of raising or enforcing payment of the penalty had rested in the discretion of the justice. The effect of these two sections of the Code, however, now is that, if satisfied upon a perusal of depositions that an offence of the nature described in the conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions returned in the certiorari, and may vary, confirm, reverse or modify the decision of the justice or may make such other order as they think just, and may by such order exercise any power which the justice might have exercised; and the conviction or order shall have the same effect and may be enforced in the same manner as if

it had been made by the justice, or it may be enforced by the process of the Court itself: section 883.

In the case before us the conditions prescribed by section 889 for exercising the power of amendment exist. The conviction has been brought up by certiorari (whether in aid of the writ of habeas corpus or on motion to quash the conviction seems immaterial), and the depositions, reading them (as for this purpose they ought to be read) strictly, shew that an offence was committed of the nature of that described in the conviction and over which the justice had jurisdiction. The defendant is convicted of that offence, which is now properly described; he has been ordered, as the justice ordered him, to be imprisoned therefor for the maximum period permitted by the statute, viz., six months; and he has been fined therefor \$50, as the justice also fined him, but, instead of adjudging that the fine shall be levied by distress, followed by imprisonment for six months in default of sufficient distress, the learned Judge has thought proper to adjudge imprisonment for the further term of three months only, and for non-payment simply, unless the fine and costs (which are ascertained by the order) be sooner paid. As I understand the effect of the amendment of 1890 of the Indian Act, the term of imprisonment for non-payment of the fine might have been as much as six months. On the whole I am of opinion that, though the original conviction was defective, the learned Judge had power to amend it as he has done, and that his order is not defective in any particular which has been urged against it.

The appeal must, therefore, be dismissed. See *Regina v. Dunning* (1887), 14 Ont. R. 52; *Regina v. Logan* (1888), 16 Ont. R. 335; *Regina v. Coulson* (1893), 24 Ont. R. 247 [1 Can. Cr. Cas. 114].

I ought to add that in any warrant of commitment



under which the defendant is to be committed for non-payment of the penalty, the costs of commitment and conveying to goal must be ascertained and set forth, as they have not been ascertained in the conviction: *Rex v. Payne* (1824), 4 D. & R. 72; Paley on Convictions, 6th ed., pp. 281-2, 298-9, 350. Compare the forms of conviction and commitment in this particular as given in the Criminal Code.

The appellant's counsel has since the above was written handed in a copy of the judgment of the Divisional Court in *Regina v. Roche*, [*ante*, p. 64] quashing a conviction for a breach of a transient-trader by-law. Nothing is said as to amending the conviction, and if the case is one in which the Court had power to amend, they did not exercise it. The by-law was passed under the authority of an Act of the Legislature, and it may be doubted—though as to this it is not necessary to express an opinion—whether the amendatory sections of the Criminal Code can, by force of R.S.O. ch. 90, be applied to support a summary conviction of that kind. And even if they do, it rather appears from the judgment that no offence was proved by the depositions over which the magistrate had jurisdiction, so that the main condition on which the power to amend depends was absent.

*Appeal dismissed and discharge refused.*

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, MCGUIRE AND WETMORE, JJ.

THE QUEEN V. PAH-CAH-PAH-NE-CAPI.

(*Alias* CHARCOAL, an Indian.)

*Murder—Confession—Admissibility in evidence—Admission obtained by  
inducement or threat—Onus of proof.*

1. An admission of guilt made by a party charged with a crime to a person in authority under the inducement of a promise of favour, or by reason of menaces or under terror, is inadmissible in evidence.
2. The Indian Agent, appointed under the Indian Act, R.S.C. 1886, c. 43, for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it.
3. The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown.

DECIDED: March 5, 1897.

Crown case reserved on a trial for murder.

*Rimmer*, for accused and Department of Indian Affairs.

*Johnstone*, for Attorney-General of Canada.

REGINA, ASSA., March 5, 1897.

The judgment of the Court was delivered by

WETMORE, J.—

The prisoner was convicted before my brother Scott and a jury of the murder of another Indian called Medicine-Pipe-Stem-Crane-Turning. The murdered man was found in a house on the Blood Reserve on the Belly River near Fort Macleod. He evidently had been murdered by some person. The only evidence connecting the prisoner with

the murder was an admission made by him to Robert N. Wilson, who at the time was acting as interpreter to James Wilson the Indian Agent on the Blood Reserve to which the prisoner belonged. After the prisoner was arrested on the charge and while he was a prisoner he was interviewed by Wilson, the Indian Agent, through Robert N. Wilson, the interpreter, and made the following statement, "I killed the policeman and killed him well. I also killed a boy up the river, but I did not shoot the policeman at Lees Creek. Those who accuse me of that crime lie about me. What I had done I do not deny, I do not hide. I do not like people to accuse me of crimes I did not commit." Wilson, the Indian Agent, then asked the prisoner, "Where did you kill the boy, inside the house or out?" to which the prisoner replied, "outside." He was then told that the body was found inside, and was asked if he did not kill him inside, to which he replied, "No, I killed him outside." Mr. Wilson then asked him, "Where did you kill the man, near the house, or below the house, or where?" Prisoner replied, "Beyond the house." Prisoner was then told that the body was found inside the house and that it was believed that the young man was killed there and he was to recollect where the killing took place, to which he finally replied, "Ask my wife, she knows all about it and can tell it all to you, my memory is not clear." The part of this admission, which, it is claimed, admitted the murder of the Indian man "Medicine-Pipe-Stem" by the prisoner was, "I also killed a boy up the river." The murdered man was about 25 years old, the prisoner is a much older man and the only evidence which pointed to the fact that the prisoner had reference to the murdered man was the fact that the man was found murdered at the place I have stated and the following facts testified to by Robert N. Wilson, namely

that Indians of the prisoner's tribe are from superstitious notions not in the habit of mentioning the names of deceased personal acquaintances in ordinary conversation if they can avoid it, that middle aged and elderly Indians are in the habit of speaking of any young man, whom they have known from boyhood, as a boy, and that the prisoner and the interpreter both reside on a point on the Belly River below the scene of the murdered man's death. The evidence of Robert N. Wilson as to the admission in question was objected to. Before it was received, Robert N. Wilson, the only witness who gave evidence of the admission, testified as follows, "Neither during the conversation, nor at any other time before, did I to my knowledge, nor did any one else, make any threat or hold out any inducement to him to procure him to make a statement in regard to the killing." On cross-examination he testified as follows, "At the interview I was acting as interpreter to Mr. Wilson, the Indian Agent. In the first instance the interview was between Mr. Wilson and the prisoner, through me as interpreter. I do not remember the opening of the conversation. I did not ask him about the shooting. I do not remember telling him that he need not be afraid as we were not policemen. As far as I can remember, any statement he made was entirely voluntary." The learned judge then put the following question, "Assuming that prisoner did make any implicating statements, can you state from what occurred, why he should have made such a statement." Answer, "I think it was because he was in the boasting mood at the time." The learned judge then put the question, "From your knowledge of Indian character can you state whether they are in the habit of boasting of acts which were never committed by them? Answer, "I would say they are not." The evidence was then admitted, subject to objection, by which I

mean the counsel for the prisoner still pressing his objection. After the evidence was admitted Robert N. Wilson, in cross-examination, testified as follows, "I was rather surprised when he started on the subject of his crime, as they had no connection with the previous subjects. If Mr. Wilson had said anything to him to induce him to speak about his crimes I would have remembered it. I do not remember whether he stated why he had killed the Indian, but I would not swear that he did not make any statement as to his motives."

After the admission was received James Wilson, the Indian Agent, was called and examined by the Crown, and testified as to what occurred at the interview in question as follows, "I am instructed to act as legal adviser to Indians under my jurisdiction. As a rule I always tell them that I am here as their adviser to help them. I remember being in the guard room and having a conversation with prisoner through Mr. Robert Wilson as my interpreter; I heard his evidence with reference to that conversation and what took place there. I believe that he faithfully interpreted between us. I am not prepared to say I did not hold out any threats or inducements to get the prisoner to make a statement. I am not prepared to contradict him when he says that no threat or inducement was held out and the prisoner's statement as to killing was a voluntary one." On cross-examination he stated, "I, as a rule, always look after the defence of Indians of my reserve who are charged with offences. They all understand that I do that. They have been repeatedly told so. When necessary to retain advocates to conduct such defences I have always assisted them in the defence and in procuring evidence. I always interview the accused before the trial if possible. I make it a rule to tell Indians so charged that what they tell is to their

benefit to assist in their defence. I do not remember whether I told prisoner that, at the time of the interview at which Robert N. Wilson acted as interpreter. I procured the interview for the purpose of assisting him in his defence."

At the close of the case the counsel for the prisoner applied to have the evidence of Robert N. Wilson as to the admission struck out which the learned judge refused. The learned judge reserved three questions for the consideration of this Court:

1st. Whether the admission was properly received?

2nd. If properly received whether, from what subsequently appeared, it should have been struck out?

3rd. Whether the evidence is sufficient to support the conviction?

I am of opinion that the evidence should have been struck out. The authorities are abundantly clear that an admission of guilt made by a party charged with an offence to a person in authority under the inducement of a promise of favour, or by menaces, or under terror, is inadmissible. This is so clear that it does not require authority to be cited in support of it. Whether if the promise or threat is made by a person not in authority, that is sufficient to reject the admission it is not now necessary to decide because I am of opinion that James Wilson, the Indian Agent was, *quoad* the Indians on his reserve, a person in authority. In the first place he is appointed by the Governor-in-Council to carry out "The Indian Act" (R.S.C. cap. 43) and the Orders-in-Council made under it (see sec. 8, subsec. 3 of that Act) and in the second place he is *ex officio* a Justice of the Peace; see 53 Vict. c. 29, sec. 9 (Acts of 1890).

Assuming the rule which provides that such admissions to persons in authority should not be admissible, if made

under the inducements mentioned, to be sound in principle (and the contrary cannot be now held) I cannot conceive of a case where it ought to be more strictly insisted on than as between an Indian and the Agent of his Reserve. These Indians are, for the most part, as we who reside in the Territories know, unacquainted with the English language, or but imperfectly acquainted with it. The rules and principles of British law or upon which it is administered are not familiar to them, and when a serious matter arises, such as has arisen in this case, they must be largely dependant upon the Indian Agent who is over them, for assistance and guidance. So we find it stated in evidence in this case by James Wilson, the Indian Agent, that he is instructed to act as legal adviser to Indians under his jurisdiction, and that he always interviews the accused before the trial if possible. I do not wish to be understood as holding that communications made by an Indian to the Agent under such circumstances are privileged. It is not necessary to hold that for the purposes of this case, and I therefore express no opinion on that question. But I do most unhesitatingly hold that a confession made to such an Agent, under the inducement of a promise or of a threat or menace is not admissible. The character of the inducement to render the admission inadmissible may be of a very slight character. An admission obtained under the following inducement, "You had better tell the truth, it may be better for you" was held inadmissible. *Reg. v. Fennell*, 7 Q.B.D. 147.

I was urged, however, that in this case no positive evidence that an inducement was offered was proved. This is true. But while I do not rule that if an admission of the accused is admitted in evidence without the question being raised whether it was made under some inducement

or threat, I do hold that if that question is raised, the burthen of proving that it was not made under an inducement or threat is on the Crown and not on the prisoner. This question was discussed in a very recent case in England decided in 1893, *Reg. v. Thompson*, [1893] 2 Q.B. 12, in which Cave, J., giving the judgment of the Court, lays it down at page 395 that it is the duty of the prosecution to prove "in case of doubt that the prisoner's statement was free and voluntary" and in concluding his judgment (at the same page) referring to the evidence on which it was sought to put the admission, he says, "In this particular case there is no reason to suppose that Crewden's evidence was not perfectly true and accurate, but on the broad plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received."

So that in this case I say that in view of the testimony given by James Wilson it was not proved satisfactorily by the testimony of Robert N. Wilson that the confession was free and voluntary, and therefore the admission ought to have been struck out. I will not repeat the evidence which I have quoted beyond this, that James Wilson swore that he made it a rule to tell Indians so charged that what they tell is to their benefit to assist in their defence and that he is there as their adviser to help them. Now, while there is no positive evidence that this or anything to that effect was stated to the prisoner in this case, it is not to my mind satisfactorily established that it was not.

Robert N. Wilson, swearing that he does not remember this and he does not recollect that, is not sufficient. I cannot more clearly draw attention to the unsatisfactory character of this testimony under the circumstances than by referring to the portions of the testimony of the two Wilsons, and in my opinion Robert N. Wilson's testimony



on cross-examination that if the Indian Agent had said anything to the prisoner to induce him to speak about his crimes he would have remembered it, will not help the Crown for two reasons, first, because his previous evidence shews that his memory as to what took place is not very accurate or reliable, and, in the second place, what would in law be an inducement might not strike the Wilsons as such. I do not wish to be understood as drawing too close lines around the question of the admissibility of such admissions beyond what is laid down in *Reg. v. Thompson*. But in this case in view of Mr. James Wilson's evidence as to his usual course in such cases and Mr. Robert Wilson's want of memory or rather want of positiveness, I am of opinion that the Crown failed to establish satisfactorily what was necessary to allow the evidence of the admission to remain on the Judge's notes.

As without this admission there was no evidence to connect the prisoner with the murder the conviction must be quashed. It is not therefore necessary to express any opinion as to the other questions reserved by the learned Judge.

RICHARDSON, ROULEAU,\*and MCGUIRE, JJ., concurred.

*Conviction quashed.*

**Note:** *Confession to person in authority—Inducement or threat—Voluntary admission—Onus of proof*

See Note, Vol. II. Can. Cr. Cas., 398-401.

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

## APPEAL SIDE.

BEFORE SIR ALEXANDRE LACOSTE, C.J., AND BOSSÉ,  
BLANCHET, WÜRTELE, AND OUMET, JJ.

## THE QUEEN V. LAMOUREUX.

*Receiving stolen goods—Housebreaking and theft—Summary trial for latter offence—Illegality of conviction thereon for 'receiving'—Kindred offences—Conviction for lesser offence—Cr. Code 711, 713.*

1. In the offence of receiving stolen goods the stolen goods must have been taken and stolen by a person other than the person accused of the receiving.
2. The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft.

MONTREAL, November 27, 1900.

The judgment of the Court was delivered by

WÜRTELE, J.—

In this matter a reserved case has been submitted by His Honor M. C. Desnoyers, Esquire, one of the Judges of the Sessions of the Peace for the City of Montreal, for the opinion of the Court.

Edouard Lamoureux was tried before Mr. Desnoyers under the provisions of the Criminal Code respecting the speedy trial of indictable offences, upon the charge of having on the twentieth day of September, one thousand nine hundred, broken into and entered the dwelling-house of Hormisdas Laporte, situated on Dorchester Street, in the City of Montreal, and of having stolen therein certain goods of the value of \$80, the property of the owner of the house. The evidence did not prove the breaking into the dwelling-house and the theft therein by

the prisoner, but the Clerk of the Peace who acted on behalf of the Crown contended that he had proved against him a case of receiving stolen goods, and he asked that the prisoner should be convicted and sentenced for that offence. The prisoner's counsel on the other hand alleged that a conviction for receiving stolen goods could not be rendered on a charge of housebreaking accompanied with theft.

The question submitted for the opinion of this Court is whether the offence of receiving stolen goods is comprised in the description contained in the charge of the offence of housebreaking accompanied with theft, and whether a conviction can be rendered against the prisoner for receiving stolen goods on the charge as stated and for which he was tried, of housebreaking and theft. Section 713 of the Criminal Code enacts that: "If the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved." The Clerk of the Peace contends that the offence of receiving stolen goods is included in the offence of housebreaking accompanied with theft, and he claims that under this enactment the prisoner can be convicted and sentenced.

In general, a conviction can only be rendered when the charge as stated has been proved; but, by exception, under section 711 of the Criminal Code, an accused person can be convicted of an attempt when the commission of the offence is not proved but an attempt to commit it is established, and under the section now under consideration, when the full offence charged is not proved but some other offence included in it is established, the accused can be convicted of such other offence. Lesser offences are included in greater offences of the same class or character,

when all the essential elements or ingredients comprising such minor offences are contained in such greater offences. Section 713 is founded upon a principle of the common law mentioned by Mr. Justice Taschereau at page 819 of his commentary on the Criminal Code, that upon a charge of an offence composed of several ingredients the jury might, as a general rule, convict of any offence included in the one directly charged. Section 713 authorizes the conviction of a person who is accused of the commission of an offence for the commission of another offence if such other offence is included in the offence charged; but in order to be so included all the essential elements or ingredients which constitute such other offence must be included in the offence with which such person is charged.

Now the question is: does the charge of housebreaking and stealing goods include the offence of receiving stolen goods, and does the offence charged contain all the essential elements or ingredients of the offence of receiving stolen goods? The crime of burglary or of housebreaking is not of a kindred character to the crime of receiving stolen goods, and the latter crime cannot, therefore, be included in the former. But does the crime of theft contain all the essential elements or ingredients of the crime of receiving stolen goods, and comprise all the facts which constitute the latter? If it contains and comprises them, the crime of receiving stolen goods is included in the crime of theft, but if it does not contain and comprise all of them, then the crime of receiving stolen goods is not included in it.

The crime of larceny or theft is the felonious taking and carrying away of goods of another—the thief takes and carries away goods in the actual or constructive possession of the owner, but the crime of receiving stolen goods requires in the first place that the goods received have been stolen by a person other than the receiver, in

the next place that they be received subsequently to the theft, and lastly, that the receiver had guilty knowledge that they were stolen. Upon a charge for receiving stolen goods, there should be some evidence to shew that the goods were in fact stolen by some other person and recent possession of the stolen property is not alone sufficient to support such a charge, as such possession is otherwise evidence of stealing and not of receiving. Russell on Crimes, 6th ed., Vol. 2, page 438. The essential elements or ingredients which constitute the two offences are not the same; the offence of receiving stolen goods contains essential elements or ingredients which do not form part of the offence of theft, and comprises facts which are not required in it. The commission of the offence of theft does not, therefore, include the offence of receiving stolen goods, and upon a charge of housebreaking and theft a conviction, whatever may be the proof, cannot be rendered under the provisions of section 713 for the offence of receiving stolen goods.

We, therefore, answer the question submitted in the negative, and say that under section 713 of the Criminal Code a conviction for receiving stolen goods cannot be rendered against a person who is charged with housebreaking and theft; and we order an entry to be made on the record to that effect.

*Order to certify opinion to Court below.*

*J. P. Cooke, Q.C., Crown prosecutor.*

*C. A. Wilson, for defendant.*

**Note:** *Receiving stolen goods—Nature of evidence required—Recent possession as evidence.*

Upon an indictment for receiving stolen goods, there should be some evidence to shew that the goods were in fact stolen by some other person, and a conviction for receiving should not be had on such evidence of

**Note—Continued.**

taking possession as would ordinarily prove the defendant guilty of the theft. *R. v. Densley* (1834), 6 C. & P. 399. In the latter case the evidence was that the goods, having been discovered, after the loss, concealed in an old engine-house, several persons kept watch, and one of the prisoners came alone in the night and took the goods out of the engine-house. He was immediately seized and dropped the bag in which the goods were, in a field of grain, and shortly afterwards the other prisoners came up and carried the bag away. Patteson, J., in summing up to the jury on a trial for receiving, said that this was evidence on which persons are constantly convicted of stealing; that if the jury were of opinion that some other person stole it, and that the prisoners knew of that fact, and planned together in order to get the goods away, they might be convicted of receiving; there was no evidence that any other person stole the property, but "if there had been evidence that some one person had been seen near the house from which the property was taken, or there had been strong suspicions that some one person stole it, then those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen." Patteson, J., in *R. v. Densley* (1834), 6 C. & P., at page 400.

In *Deer's case* (1862), 1 Leigh & Cave's Crown Cases, 240, the prisoner had been a lodger in the prosecutor's house and left the same. On the following day the prosecutor's wife also left, taking with her a small bundle. Two days afterwards the prisoner was found in company with the prosecutor's wife, who was passing by the prisoner's name, on board a ship bound from England to Canada. Property belonging to the prosecutor of a bulk *greater than* could have been comprised in the bundle *taken by the wife*, was found in the prisoner's possession on the ship, some part being upon his person. It was held by the Court for Crown cases reserved, composed of Pollock, C.B., Wightman, J., Williams, J., Channell, B., and Mellor, J., that such was *some* evidence to support a conviction for receiving the property knowing it to have been stolen.

A person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive the goods knowing them to have been stolen. *R. v. Hughes*, Bell, C.C. 242.

Where, on the trial of an indictment for receiving a stolen shirt, it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt and a statement made by her that she had received it from another person, it was objected that there was no evidence of receiving, with knowledge that it had been stolen, Littledale, J., said:—"In a case on the early part of this circuit, the only evidence was recent possession, and the counsel for the prosecution urged that that was

**Note—Continued.**

evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the *possession of some one else* before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else; that is evidence of receiving." *R. v. Sarah Cordy* (1832), Gloucester Assizes, Littledale, J., cited 2 Russell on Crimes, 6th ed., 438.

Where the thief, who had pleaded guilty, had admitted to a constable *in the presence of the prisoner*, who was indicted as receiver, that he had stolen the property, and this was the principal evidence of the larceny, it was held that the thief's confession was evidence to go to the jury against the receiver. *R. v. Cox*, 1 F. & F. 90, per Crowder, J. But a confession of the principal in the absence of the receiver is not evidence against the latter. *R. v. Turner*, 1 Moo. C.C. 347. The necessary evidence that the offender knew the goods which he has received to have been originally stolen, may be collected from the circumstances of the particular case. 2 Russell on Crimes, 440. And the buying goods at an undervalue is presumptive evidence that the buyer knew they were stolen. 1 Hale 619; 2 East P.C. c. 16, s. 153, p. 765.

Recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances of the case. So, where goods have been stolen from a dwelling house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, *together with* proof that they were actually stolen, would amount not to a violent, but to a probable presumption merely. Archbold's Crim. Pleading (1900), 312. But if the property were not found recently after the loss, as for instance not till sixteen months after, it would be but a light or rash presumption and entitled to no weight. *Anon*, 2 C. & P. 459; *R. v. Adams*, 3 C. & P. 600; *R. v. Cooper*, 3 C. & K. 318.

If the prisoner give a *reasonable account* of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. *R. v. Crowhurst*, 1 C. & K. 370; *R. v. Smith*, 2 C. & K. 207; *R. v. Harmer*, 2 Cox C.C. 487.

Where, on a charge of receiving, it was proved that the prisoner had told the constable who found the stolen property in his possession, that he had purchased it from a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held to be unnecessary to call the tradesman if the jury could fairly infer from the other circumstances of the case that the prisoner's statement was

**Note—Continued.**

false. *R. v. Ritson* (1884), 15 Cox C.C. 478 (Grove, Hawkins, Stephen, W. Williams and Mathew, JJ.). It is a question in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner. *Ibid.*

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[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, VANWART, AND MCLEOD, JJ.

**Ex parte WOODSTOCK ELECTRIC LIGHT CO.**

*Corporation—Whether liable to summary conviction—Code Forms in-applicable—Enforcing payment of fine—Insufficient distress—“Person”—Penalty under order in council—Regulation to give effect to statute—Cr. Code 562, 637, 853, 856, 982.*

1. The procedure of the Criminal Code as to summary convictions does not apply to corporations.
2. A magistrate making a summary conviction and directing a distress to levy the fine imposed, is bound to award imprisonment for want of sufficient distress (Code Forms and Code sec. 982), and the summary convictions procedure is not applicable to corporations, as a conviction cannot be made in the terms of the Code Forms (Code schedule 1).
3. As regards charges of a criminal nature, a corporation is not within the statutory term “person,” which by The Interpretation Act, R.S.C. 1886, c. 1, is declared to include “any corporation to whom the context can apply,” etc.

ARGUED: January 27, 1898.

DECIDED: April 23, 1898.

Motion to make absolute a rule nisi calling upon Josiah R. Murphy and Charles McLean, Justices of the Peace for the County of Carleton, N.B., and the Department of Inland Revenue, to shew cause why a writ of certiorari should not issue to bring up a conviction made by the said justices against the applicants under the Statutes of Canada, 57-58 Vict. c. 39, s. 35, with a view to quashing the same.



FREDERICTON, N.B., January 27, 1898.

*Pugsley*, Q.C., and *E. H. McAlpine*, shewed cause.  
*A. B. Connell*, in support of the rule.

FREDERICTON, N.B., April 23, 1898.

The judgment of the Court was delivered by

TUCK, C.J.—

The defendants were convicted before Josiah R. Murphy and Charles McLean, Justices of the Peace for the County of Carleton, for supplying electricity to the purchasers thereof from the first of August, 1897, until the twenty-seventh of October, 1897, without first having procured from the Department of Inland Revenue, or from an officer appointed for that purpose, a certificate of registration as required by c. 39, s. 35, 57 and 58 Vict., Statutes of Canada, contrary to the provisions of the Act and the Order in Council made thereunder, and were adjudged to forfeit and pay the sum of fifty dollars penalty and eight dollars and fifty-five cents costs.

The information was laid on the twenty-seventh day of October, 1897, and the conviction was made on the twenty-eighth day of October, 1897. It was ordered by the conviction that if the penalty and costs were not paid forthwith, the same should be levied by distress and sale of the goods and chattels of The Woodstock Electric Light Company.

This is an application for a certiorari to bring up the proceedings in order that they may be quashed.

Section 35 of chapter 39, 57 and 58 Vict. (Can.), enacts that “before supplying electricity to purchasers, the  
“contractors shall obtain from the department, or from  
“an officer appointed for the purpose, a certificate of

“registration, and shall pay the officer issuing such  
“certificate the fees prescribed by the Governor in  
“Council.”

2. “Such certificate shall expire on the thirtieth of  
“June in each year, and shall be renewable from year to  
“year.”

By Order in Council of 28th May, 1895, the fees are prescribed. See Acts of 1895 (Can.), pages 34 and 35—Orders in Council. It seems that for failing to comply with section 35 a penalty has been prescribed by Order in Council. Section 33 provides how the penalties shall be recovered. Section 37 gives power to the Governor in Council to establish rules and regulations. Sub-section (c) says: “Such other regulations not inconsistent with this  
“Act as are necessary for giving effect to its provisions  
“and for declaring its true intent and meaning in all cases  
“of doubt.”

On the first of August, 1895, the following regulation was established: “For every failure to procure a certificate  
“of registration as required by section 35, and the payment  
“of the fee established therefor within thirty days after  
“the first day of July in each year, the contractor shall  
“incur a penalty not exceeding one hundred dollars and  
“not less than fifty dollars.” I think it was quite within the power of the Governor in Council to pass this regulation imposing a penalty for failure to procure a certificate of registration as required by section 35. This regulation is not inconsistent with the Act, and the power to pass it is given by section 37. I think also that the prosecution was commenced in time. The conviction is for supplying electricity without taking out a certificate, between the first day of August and the twenty-seventh of October, and the information was laid on the last named day. There can be no reasonable ground for saying that the

offence was committed on the first day of July and not afterwards. It was committed each day that electricity was supplied without taking out a certificate.

An important point, however, has been argued as to the power to convict a corporation under the Summary Convictions clauses of the Code. Provision is made by sections 637 and 638 of the Criminal Code, whereby proceedings by way of indictment may be taken against a corporation, but nothing is said in any of the sections as to conviction in a summary way of a corporation for violation of a statute. A corporation cannot be sent to gaol and cannot enter into a recognizance. A corporation aggregate may be indicted by their corporate name for disobedience of an order of justices requiring such corporation to execute works pursuant to a statute: *The Queen v. Birmingham Ry. Co.*, 3 Q.B. 223. But this is very different from proceeding against a corporation summarily, and adjudging it to pay a penalty and costs, and in default of payment that the amount may be levied by distress and sale of its goods and chattels. An attachment cannot be granted against a corporation for non-payment of costs: *Doe v. Crawford*, 3 All. (N.B.) 266.

In the Criminal Code under the head "summary convictions" and "arraignment of accused," section 856 enacts that "if the defendant is present at the hearing, the substance of the information or complaint shall be stated to him and he shall be asked if he has any cause to shew why he should not be convicted, or why an order should not be made against him, as the case may be." And section 2 provides that if the defendant thereupon admits the truth of the information or complaint, and shews "no sufficient cause why he should not be convicted, etc., the Justice present at the hearing shall convict him or make an order against him accordingly."

A conviction cannot be made such as the law requires. In the present conviction no imprisonment is awarded. All the forms in the Criminal Code award imprisonment in default of sufficient distress to pay penalty and costs. All the forms in schedule 1 to the Criminal Code are made valid by section 982. I think that the magistrate is bound to award imprisonment for want of sufficient distress.

I have been unable to find a case in the English reports where this point was taken. There are cases, however, where a corporation has been summarily convicted. One such case is *Bowyer v. The Percy Supper Club, Limited*, [1893] 2 Q.B. 154. In that case the respondents, a registered company, were the proprietors of a club. The appellant applied to become a member of the club, and having paid a subscription was elected an honorary member pending inquiries, and was then supplied with beer, wine and spirits, for which he paid. The respondents did not hold any license for the sale of intoxicating liquors. It was held that the respondents might be convicted for selling beer, wine, and spirits without a license and the case was remitted to the magistrate. The judgment was given by Mathew and Wright, JJ., and the case was argued for the respondents by Poland, Q.C., and Danckwerts, and for the appellant by Crump, Q.C., and E. W. Bullen; but the point as to the power to convict summarily was not taken by counsel nor referred to by the Court. And that is what shakes the strong view I entertain upon this question. Either the counsel before the Queen's Bench Division thought there was nothing in the point, or else their sole object, without questioning the magistrate's power under the Summary Jurisdiction Act, was to obtain a judicial decision as to the right of clubs to sell liquors to their own members without a license. But, whatever may have been the reason, the point was not taken. The information

against this club was laid under the statute 35 and 36 Vict. c. 94. I have examined this statute and also the Imperial Summary Jurisdiction Act, and do not find that they have any special provision in regard to corporations. In that respect they do not differ from our own statutes of a like character.

There are two cases, *Oxford Tramway Co. v. Sankey* and *Badcock v. Sankey*, argued together and reported January 18, 1890, 6 T.L.R. 151. They were under the Summary Jurisdiction Act, 20 and 21 Vict. c. 43. These cases raised a curious question: whether passengers can enforce against a tramway company rules or by-laws limiting the number of their passengers. A person who had been a passenger in one of the Oxford Tramway carriages, and who had been inconvenienced by a greater number being carried than allowed by by-laws, summoned the manager, and the company's solicitor appeared before the magistrate. The objection was taken that the company should have been summoned, upon which the summons was amended, and the magistrate allowed the complaint and fined the company. In another case, that of *Badcock*, the conductor was summoned and he also was fined. Both he and the company appealed and the justices stated a case. The Court, composed of Baron Pollock and Wills, J., allowed the appeal, and set aside the conviction on the ground that the justices had no power to amend the summons by inserting the name of another person; but nothing was said as to the power to convict a company summarily.

In the Criminal Code, as to summary convictions, the expression "person" is used, but nowhere is found "corporation" or "body corporate."

The Interpretation Act, R.S.C., 1886, c. 1, s. 7, s.-s. 22, makes provision as to this by enacting that "the expression

“‘person’ included any body corporate and politic, and the  
 “heirs, executors, administrators, or other legal represen-  
 “tatives of such person to whom the context can apply,  
 “according to the law of that part of Canada to which the  
 “context extends.”

In the *Pharmaceutical Society v. The London and Provincial Supply Association, Limited*, 5 App. Cas. 857, the question was whether the word “person” in 15 and 16 Vict., c. 56, includes a corporation. In delivering judgment the Lord Chancellor (Selborne) said: “There can be no  
 “question that the word ‘person’ may, and I should be  
 “disposed myself to say *prima facie* does, in a public  
 “statute include a person in law, that is, a corporation as  
 “well as a natural person.” Again he said: “It is certain  
 “that this word is often used in statutes in a sense in  
 “which it cannot be intended to extend to a corporation.” The Interpretation Act makes it clear that the word “person” may mean a body corporate or politic according to the law of that part of Canada to which the context extends.

There is a case in Ontario which, while it does not govern, is directly in point. It is the opinion of a single Judge, Mr. Justice Robertson. *Re Chapman and The Corporation of the City of London*, 19 Ont. R. 33. The head note to that case is: “A writ of prohibition may be issued  
 “to a justice of the peace to prohibit him from exercising  
 “a jurisdiction which he does not possess.”

The word “person” in the Revised Statutes of Canada, c. 1, s. 7, s.-s. 22, includes any corporation “to whom the context can “apply according to the law of that part of Canada to “which such context extends,” but as justices of the peace have not now, and never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred

against corporations, such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction. A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment, and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them.

The motion in that case was before a single Judge, Mr. Justice Robertson. In the course of his judgment he says: "I am clearly of opinion that the justice has no jurisdiction in this matter; he cannot compel the corporations or either of them to appear before him; should he summon them they need not obey; should they not obey he cannot issue a warrant to bring them or either of them before him: although they and each of them are a corporate body, yet their body cannot be taken into custody and the justice has no power to proceed *ex parte*. The accused must be before the Court when the testimony is given, and the procedure points out what is to be done when the accused does appear, etc. Nor can the justice commit or detain in custody nor can he bind over to appear and answer to an indictment; that being so he has no jurisdiction to bind over the prosecutor or person who intends to present the indictment."

My own views on this point are in accord with those expressed by Mr. Justice Robertson, and in the absence of any direct authority to the contrary, I am constrained to give expression to my own opinion.

The rule must be made absolute.

HANINGTON, VANWART, and MCLEOD, JJ., concurred

*Rule absolute for certiorari.*

**Note:** *Liability of a corporation to summary conviction.*

A different conclusion to the above was arrived at by a Divisional Court of the High Court of Justice of Ontario in *The Queen v. Toronto Ry. Co.*, 2 Can. Cr. Cas. 471, in which it was held that the procedure of the Code as to summary convictions applies as well to corporations as to natural persons, and that the fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment does not prevent the application of the summary procedure in other respects to corporations. Mr. Justice Rose, whose judgment was affirmed by the Divisional Court, there commented on the decision of Robertson, J., in the *Chapman Case*, 19 Ont. R. 33, referred to in the above judgment, as follows:—"It is clear that the learned judge in that case was directing his observations to a case where the offence might be the subject of an indictment, and his language, though somewhat general, must, I think, be read in view of the facts of that particular case, and I do not find myself, therefore, concluded by either the observations or decision of my learned brother Robertson." 2 Can. Cr. Cas. at page 476.

See also *R. v. Eaton Co. (Ont.)* 2 Can. Cr. Cas. 252 and Notes at pages 254 and 482 of Vol. 2 Can. Cr. Cases.

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[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, SENIOR COUNTY JUDGE,  
CHAIRMAN OF THE SESSIONS.

**THE QUEEN v. MALLOY.**

*Appeal from summary conviction—Courts of General Sessions in Ontario  
—No right to a jury on the appeal—Constitution of Courts of  
General Sessions—Constitutional law—Cr. Code sec. 881 intra vires  
—Malicious injury to property—Cr. Code 511, 879, 881.*

1. An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury ; and Code section 881, constituting such court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is intra vires of the Dominion Parliament.
2. A statutory provision that the appellate court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the court.

ARGUED : May 21, 1900.

DECIDED : October 9, 1900.

The defendant Howard Malloy appealed from a summary conviction by a justice of the peace upon a charge, under sec. 511 of the Code, of malicious injury to property. Upon the appeal coming on to be heard, counsel for the appellant claimed a trial by a jury.

TORONTO, May 21, 1900.

*J. W. McCullough*, for defendant: The Court of General Sessions in its jurisdiction as a court of first instance is constituted with a jury. The defendant appealing demands a trial by a jury. Code section 881 is ultra vires in attempting to deprive the appellant of that right. It is an interference with the "constitution of the courts" as well as with "civil rights" both of which subjects are

under Provincial jurisdiction. B.N.A. Act, s. 92, sub-secs. 13, 14. The right to a jury on an appeal was recognized and confirmed by C.S.U.C. c. 114, sec. 3, and no Ontario legislation has taken away that right. I refer to *R. v. O'Rourke*, 1 Ont. R. 470; *R. v. Foley*, 2 Cartw. 653 (n); *R. v. Cox*, 2 Can. Cr. Cas. 207; *R. v. Pattee*, 5 Ont. Pr. 292; *Hewett v. Cane*, 26 Ont. R. 133; *R. v. Bush*, 15 Ont. R. 404.

*S. A. Jones*, for Ludwig Hoover, the private prosecutor, respondent on the appeal: A provision respecting the jury is a matter of procedure only. *R. v. Bradshaw*, 38 U.C. Q.B. 564. The trial and mode of trial are separate matters, not included in the term 'organization of the court.'

[The Attorney-General of Canada and the Attorney-General of Ontario were notified of the argument, by reason of the constitutional question involved, but did not appear.]

TORONTO, October 9, 1900.

MCDougall, Co. J.—

This is an appeal by the defendant from a conviction made by W. B. Saunders, Esquire, a Justice of the Peace, for alleged malicious injury to property, an offence punishable upon summary conviction under s. 511 of the Criminal Code. From such conviction an appeal lies to the Court of General Sessions by s. 879 of the Code. In the May Sessions, upon a notice of appeal being duly proved, Mr. McCullough for the appellant claimed that the appellant had a right to have the appeal tried by a jury, notwithstanding s. 881 of the Code. That section enacts that when an appeal against any summary conviction or

decision has been lodged in due form, etc., etc., "the court appealed to shall try, and shall be the absolute judge as well of the facts as of the law in respect of such conviction or decision."

Mr. McCullough contends that this section, so far as it purports to deprive the appellant of a jury, is *ultra vires* of the Dominion Parliament. He claims that a jury is an integral part of the Court of General Sessions, and, therefore a part of the constitution of the court. The British North America Act, s. 92, sub-s. 14, grants exclusively to the local Legislatures the power to constitute, maintain and organize the Provincial courts, both civil and criminal; hence if a jury or the right to a jury is fundamental and forms part of the constitution of the court, and its allowance or disallowance is not a mere matter of procedure, the local Legislature alone has the power to legislate in respect thereto, and, therefore, is the only Legislature which could by an enactment deprive an appellant of his right to have his appeal tried by a jury.

There is nothing in R.S.O. 1897, c. 56 and 58 (the two Acts in the Revised Statutes purporting to relate to the General Sessions of the Peace) which in any way attempts to define the constitution of the Court of General Sessions. Section 2 of c. 56 simply confirms former commissions and courts. Section 4 directs that sittings of the court shall be held semi-annually in all counties in Ontario, except York where there shall be four sittings. Section 6 enacts that the County Judge shall preside as chairman. Section 7 provides that, if the judge or junior or deputy judge presides, no associate justices need be present to constitute the court. Chapter 58 R.S.O. merely limits the jurisdiction of the court in certain cases. There is no legislation by the province since confederation affecting the courts of criminal jurisdiction, or which defines more closely the

constitution of the several courts. Any statutory provisions purport only to prescribe regulations as to the judicial officers who are to preside over and conduct the business of the said courts.

It becomes necessary, therefore, to consider the constitution of the Court of the General Sessions of the Peace as it existed in Canada before confederation. It is clear that the office of Justice of the Peace and the Court of General Sessions, or Court of General Quarter Sessions, as it was formerly called, were in existence in Canada before the meeting of the first Parliament of the Province of Upper Canada, that is, prior to September 17th, 1792. In this first Parliament of the province, c. 5 of the statutes enacted that the magistrates in each and every district of the province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires. By c. 6 any two or more Justices of the Peace acting under and by virtue of His Majesty's commission within the respective limits of their said commissions were empowered to hold Courts of Request within their respective divisions which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions, etc., etc. By statutes passed in subsequent sessions of the same Parliament the time for holding these courts were fixed and changed. By subsequent Parliaments the existence of these courts was recognized. On the 29th May, 1801 the Statute, 41 George III., c. 6, was passed. It recited that doubts had arisen with respect to the authority under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the province, and also the authority under which commissions of the Peace, commissions of Assize and Nisi Prius,

commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively, and then proceeds to enact: "That the authority under which the said courts and commissions had been erected, holden and issued, and also all matters and things done by virtue of the same are so far as relates to the authority under which the same have been so erected, holden, issued and done, good and valid to all intents and purposes whatsoever, and that the provisions of the Acts of the Legislature of the province respecting the said courts and commissions, or any of them, are hereby declared to extend and to be in force, except as hereinafter mentioned, in each and every the said districts respectively."

This enactment so far as it relates to the authority under which commissions had been issued and the courts of General Quarter Sessions of the Peace had been held was embodied in the Consolidated Statutes of Upper Canada, c. 17, s. 1, and has been repeated in the various Revised Statutes of Ontario down to R.S.O. 1897, c. 56, s. 2.

The late learned Judge Senkler, County Judge of Lincoln, in a paper he prepared, and which was read before a meeting of the County Judges, commenting on the foregoing statutes, remarked:—"It will be observed that this enactment (41 Geo. III., c. 6) did not create the courts nor even define their jurisdiction. It simply gave the sanction of the Legislature to the courts and to the authority under which they were held, and did not indicate what that authority was. "I think, however," he adds, "there can be little doubt but that the first Commissions of the Peace were issued in what is now Ontario in consequence of the introduction of the English Criminal Law and as part of that system."

The Criminal Law of England was introduced into the Province of Quebec by Royal Proclamation in 1763, and subsequently extended by 14 Geo. III., c. 83 (Imp.) to what is now Ontario. After the erection of what is now Ontario into a separate Province, the Provincial Legislature, after reciting the Imperial Act 14 Geo. III. c. 83, passed 40 Geo. III., c. 81 in July, 1800, enacting that the Criminal Law of England as it stood on the 17th September, 1792, should be declared to be the Criminal Law of this Province.

From this it will be seen that the Courts of General Quarter Sessions of the Peace in this Province possessed whatever jurisdiction the same courts had in England on the 17th September, 1792. If we examine the jurisdiction of the General Sessions in England we find that prior to that period they had jurisdiction to try all felonies and misdemeanors with very few exceptions. We also find it was part of the jurisdiction of justices to try appeals from acts of justices done out of Sessions in certain cases. This right of appeal was a qualified right, it could not arise by implication or exist without express enactment; whereas the Common Law remedy of certiorari always lay except when expressly taken away by statute. The appeal was usually given to the next Quarter Sessions. The justices of the Sessions in all cases of an authorized appeal to them were the absolute judges of the facts as a jury, and could not, if they would, remit any question of that kind to a superior tribunal (Dickenson's Quarter Sessions, 650—6th edition, 1845).

From the foregoing it is clear that under the English law all appeals from summary convictions made by justices out of sessions were tried and disposed of by the justices in sessions assembled without the intervention of a jury; in other words, except by express enactment so declaring it, a jury formed no part of the constitution of the Court

of General Sessions for the trial of appeals. If at any time the Legislature thought fit to confer upon parties to an appeal the privilege of a jury its force and object was to effect an alteration in the procedure governing the trial of appeals and was to that extent an innovation of modern times.

As a matter of fact, the first enactment in Canada to vary the long established practice and rule of the Quarter Sessions followed both in England and in this country, of trying appeals from summary convictions and orders without a jury was made by the Parliament of the United Provinces of Upper and Lower Canada in 1850, 13 and 14 Vict. c. 54, consolidated afterwards in the Consolidated Statutes of Upper Canada in c. 114. The preamble of the original Act reads:—

“Whereas it is expedient to extend the right of appeal in certain cases in Upper Canada; Be it, therefore, enacted, etc.: That from and after the passing of this Act any person, complainant or respondent, who shall think himself aggrieved by any conviction or decision before any one or more Justices of the Peace, Mayor, or Police Magistrate in matters cognizable by such Justices of the Peace, etc., etc., not being a crime may appeal to the next Court of General Sessions of the Peace, etc., for the county wherein the cause of complaint shall have arisen, etc.”

Then follow the formalities to be observed as to giving notice, security, etc., in order to perfect the appeal. Section 2 then enacts, for the first time, that either the appellant or the respondent may request a jury to try the matter, gives the form of oath to be administered to the jury, and concludes as follows: “And the court upon the finding of the jury shall thereupon give such judgment as the circumstances of the case may require,” etc., etc.

It will thus be seen that the Legislature first largely

extended the right of appeal against summary convictions and orders, and then followed this remedial provision by granting an optional change of procedure at the trial of such appeals. It is too manifest to be stated that had section 2 of the Act of 1850 not been added, all appeals provided for by the first section of the Act would have been tried and disposed of, both as to the facts and law, by the Justices assembled in Quarter Sessions without a jury. Section 2, however, amended the procedure and declared that, as to all appeals thereafter they should be tried in the old way unless one of the parties to the appeal desired a jury, and that if he wished a jury he must make a formal request, otherwise it would not be granted.

In 1869 the Dominion Parliament revised the whole law relating to summary convictions by 32 and 33 Vict. c. 31. By section 65 of that Act the general right of appeal from summary convictions was restricted to cases where the sum adjudged to be paid exceeded ten dollars or the punishment exceeded one month unless an appeal was otherwise provided for in any special Act. The clause allowing either of the parties to an appeal to ask for a jury was re-enacted in section 66 with some slight verbal changes not material to the question involved in the present case. In 1870, by 33 Vict. c. 27, the above-mentioned restrictions or limitations as to certain appeals were repealed and the full right restored, allowing an appeal from all summary convictions unless otherwise provided in some special Act. In 1886 all these provisions were consolidated and appear in the Revised Statutes of Canada, c. 178. In 1890, 53 Vict. c. 37, s. 25 repealed s. 78 of the Revised Statutes of Canada which allowed the parties to an appeal to request a jury, and substituted a new section (25), the clause under consideration in this appeal, The effect of this new section 25 was to restore the pro-



cedure upon the trial of appeals from summary convictions and orders, to the system that prevailed from the earliest times down to 1850. 53 Vict. c. 37, s. 25, is now section 881 of the Code.

This brief review of the history and introduction of the Court of Quarter Sessions into Canada establishes that the right to have a jury to hear an appeal from a summary conviction was first conferred by the Legislature of the United Provinces of Upper and Lower Canada, a body having the power to deal with the constitution of the court as well as with the procedure to be followed by the courts possessing criminal jurisdiction. In making the change the Legislature could only have regarded it as an alteration in the matter of procedure, as it made it a conditional change only: the court could still try the appeal without a jury and pronounce the appropriate judgment unless one of the parties intervened and requested a different method of trial. It is analogous to the procedure existing in reference to the trial of civil cases in this Province, where unless a jury notice is given by one of the parties most causes of action will be disposed of by the court without a jury. It is to be noted that all the special sections relating to jury and non-jury trials are arranged in the Judicature Act under the sub-head "Trial, Procedure and Place of Trial," (R.S.O. c. 51, s. 102 to 110).

It may also be observed that the offence, in respect of which the conviction now under consideration was made, was created by a Dominion Statute, which same statute authorizes a Justice of the Peace to try summarily an offender against its prohibition. It is the same Legislature which authorizes an appeal to the General Sessions of the Peace, and which purports to regulate the procedure to be followed at the trial of any such appeal. If the Dominion Parliament had the power to permit or deny the right of

appeal, it seems hardly arguable to contend that it could not attach such conditions and limitations as to the mode of trial of any such appeal as it might deem proper. Any directions made by the statute as to the mode of trial in my opinion amount only to regulating the procedure.

I have found only one case in the Reports since 1867, in which the present question has been at all considered, *Regina v. Bradshaw*, 38 U.C.R. 564. In that case, tried in 1875, the respondent, who was the prosecutor before the magistrate, had not asked for a jury at the hearing of the appeal at the General Sessions; indeed, though urged by the court to do so, he refused to demand a jury. The appellant likewise declined to have a jury. The court then tried the appeal without a jury and quashed the conviction with costs. The respondent then removed the proceedings by certiorari to the Queen's Bench, and moved to quash all the proceedings at the sessions on the ground that the Court of General Sessions had no power to try the appeal without a jury. The court, composed of Harrison, C. J., Gwynne, J., and Wilson, J., refused the rule. Gwynne, J., delivered the judgment of the court. He says:—

“It was suggested that the 66th section of 32 and 33 Vict. c. 31, which authorizes the court to proceed without a jury when neither party demands one is *ultra vires* the Dominion Parliament and comes within the clause of the B.N.A. Act, which places under the jurisdiction of the local Legislature ‘the constitution, maintenance and organization of provincial courts both civil or criminal,’ but the 66th section of 32 and 33 Vict. c. 31, comes, in my opinion, within the subject numbered 27, reserved for the jurisdiction of the Dominion Parliament, namely, ‘Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.’”

This is an authority which is binding upon me, being the decision of a superior court, and a decision which has not been reversed or reconsidered. I have, therefore, no hesitation in determining that the appellant in the present case cannot demand a jury to try his appeal.

[His Honor then appointed a day to hear the evidence and proceed with the appeal without a jury.]

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[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE THE HONOURABLE MR. JUSTICE HALL.

**THE QUEEN v. JOSEPH et al.**

*Appeal from summary conviction—Conditions precedent—Recognizance—  
Number of sureties—Cr. Code, sec. 880.*

1. On an appeal under Criminal Code, sec. 880, by several defendants from a summary conviction, the recognizance must be that of *two* sureties besides the appellants, and the appeal will be quashed if the recognizance is given with only one surety.
2. An appeal not being a common law right, the conditions precedent prescribed by statute must be strictly complied with.
3. The giving of security is an essential part of the appeal and unless it is done in the manner required by statute, the giving of a notice of appeal will be unavailing and the conviction may be prosecuted as if no notice had been given.

DECIDED : December 13, 1900.

THE appellants, Joseph et al, were convicted before the Police Magistrate on the 4th October, 1900, of having unlawfully affixed a trade-mark, and were condemned to pay a fine of \$25 and costs, and in default of payment to

be imprisoned for three months. On October 10, appellant's counsel gave notice of appeal, under the provisions of section 879 of the Criminal Code, to the Court of Queen's Bench, November Term, such notice being served upon the trial magistrate and upon counsel for respondent Gagnon.

The November Term continued through the whole of that month and into December, and appeal cases were not reached until the 13th of the last named month. It was only on 11th December that the appellants entered into the usual recognizance to appear and try said appeal, and furnished the security bond of *one* person in addition to their own.

Upon the case being reached respondent's counsel moved that the appeal be dismissed on the ground that security had not been furnished within the time nor to the extent stipulated: Cr. Code, sec. 880.

MONTREAL, December 13, 1900.

HALL, J.—

An appeal is not a general or common law right. It is an exceptional provision enacted by statute, and, to be availed of, the conditions imposed by the statute must be strictly complied with. They and all of them are conditions precedent. A notice that the persons convicted intend to appeal is not an appeal. It is an idle formality if not accompanied either by the surrender of the accused into custody or by their entering into recognizance with *two* sufficient sureties that they will try the appeal and abide the judgment of the court thereon and pay such costs as may be awarded against them. I have no doubt that the conviction could have been validly prosecuted against the accused during all this interval, and they have

no more rights as appellants before this court than they would have had, if they had omitted to give notice of appeal within the stipulated delay, or had, in fact, ignored all the conditions which the statute attached as conditions precedent to a right of appeal. The security bond is a part of the appeal and in my opinion the most essential part of it. I refer to Chitty's General Practice, Vol. 2, p. 315. See also Encyclopædia of Pleading and Practice Verbo. "Appeals," Vol. 2, pp. 238 and 244.

*Appeal quashed.*

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[COUNTY COURT OF NEW WESTMINSTER, B.C.]

BEFORE W. NORMAN BOLE, COUNTY JUDGE.

**THE QUEEN v. KING.**

*Summary conviction—Appeal—Entry of—Time of giving recognizance—Quashing appeal—R.S.B.C. 1897, cap. 176.*

1. Therecognizance required by sec. 71 (c) of the B.C. Summary Convictions Act, on an appeal to a County Court from a summary conviction, must be entered into before the appeal is entered for trial; and the giving of the recognizance thereafter, but before the sitting of the court, is insufficient.

DECIDED: November 15, 1900.

APPEAL to the County Court from a conviction by G. E. Corbould, Q.C., Police Magistrate of New Westminster.

Section 72 of the British Columbia Summary Convictions Act enacts as follows: "In every case of appeal to any County Court such appeal shall be entered for trial not less than three days before the day on which such Court shall be held, otherwise such appeal shall not be received or heard . . . ."

Section 73 provides that when an appeal has been duly lodged in due form, and in compliance with the requirements of this Act the Court appealed to may empanel a jury to try the facts of the case.

*Dockrill*, for the respondent, raised the preliminary objection that the appeal was not duly lodged because, inter alia, the recognizance required by the B.C. Summary Convictions Act, cap. 176, sec. 71, sub-sec. (c) was not entered into until the 11th of September, 1900 (the day the appellate court sat), while the entry of the appeal was made on the 31st of August.

*Henderson*, Q.C., and *Jenns*, for the appellant, relied on the fact that no time is fixed for giving the recognizance and therefore it was in time as it was entered into and filed on the morning of 11th September, before the Court sat, and that in any event the postponement of the appeal was a waiver of proof of the appeal.

NEW WESTMINSTER, November 15, 1900.

BOLE, Co. J.—

In *Regina v. Crouch* (1874), 35 U.C.Q.B. 433, at p. 438, per Richards, C.J., "The practice in relation to appeals is thus laid down in Dickenson's Guide to the Quarter Sessions, 6th ed., 639.—'The notice of appeal as well as the entry into recognizance, if required by statute as conditions precedent to the right of appeal, must next be proved or admitted, whether it is intended to try or only to move to respite the hearing; for, till it is made to appear to the Court that the appeal is duly lodged at the proper Sessions, as well as that due notice has been given, and recognizance entered into where so required by the Act applicable to the appeal, then jurisdiction to hear or

adjourn it will not attach . . . A respondent may so waive proof of appeal, or admit it so as to make proof unnecessary.'"

In this case respondent's counsel did neither, but on the contrary called attention of the Court to the fact that the appeal was not duly lodged and the adjournment was granted with the distinct understanding that strict proof of all conditions precedent to appellant's right of appeal should be proved whenever the hearing of the appeal was proceeded with. Vide further, *In re Meyers and Wonnacott* (1864), 23 U.C.Q.B. 611 and *Kent v. Olds* (1860), 7 U.C.L.J. 21.

It seems to me that inasmuch as on 31st August, when the appeal was entered for trial, the appellant had not entered into the recognizance contemplated by the statute, was not then in custody or had not deposited any money in lieu of security, the appeal was not entered for trial in accordance with the true intent and meaning of the Act and not lodged in due form. Vide *The Ganges* (1880), 5 P.D. 247. The words of sec. 72 are distinctly imperative and to my mind clearly indicate that no appeal can be received or heard unless the appeal is, at the time of such entry, one lodged in due form as required by the Act.

I am therefore of the opinion that the appeal cannot be entertained. All questions of costs are reserved for argument and further consideration.

*Appeal quashed.*

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## [COURT OF QUEEN'S BENCH, MANITOBA.

BEFORE KILLAM, C.J.

THE QUEEN v. STEWART.

THE QUEEN v. STALLAN.

THE QUEEN v. TAYLOR.

*Personation—Dominion Elections Act, 1900—Bail after committal—Fixing amount of—Elections Act, 1900 (Can.) s. 114—Cr. Code 602.*

1. Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow their bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount.

DECIDED : December 28th, 1900.

Three applications for bail for parties committed for trial on charges of personation at Brandon, in the elections of 1900 for the Dominion Parliament. On behalf of the Crown it was contended that each person should furnish two sureties of \$1,000 each, and enter into his own recognizance in the sum of \$2,000.

*R. G. Affleck*, for the prisoners.

*Geo. Patterson*, for the Attorney-General of Manitoba.

WINNIPEG, December 28, 1900.

KILLAM, C.J.—

In Stewart's case, the evidence of his having applied for a ballot in the name charged is most flimsy. The witnesses for this purpose were the inside and outside scrutineers for one party. The inside scrutineer can state only that the deputy returning officer told him that the name of the accused was John Flynn. He does not shew that this was said in the presence of the accused. He



states that the accused had the ballot before he had time to swear him, and it may be that the accused had gone into the voting compartment or otherwise out of hearing before the statement was made. The outside scrutineer states that the accused was voting on the name of John Flynn, and that, when the prisoner was asked his name, he said it was John Flynn. It does not appear whether this occurred in the polling booth or outside.

In the other cases the evidence is much stronger. Stallan appeared before the deputy returning officer and gave his name as Matthew Brandon; was asked to take the usual oath and refused to do so. He gave his name afterwards as Stallan, and stated that he had tried to vote, but would not take the oath. There is no direct evidence that he had not previously gone by the name of Brandon, and been entered on the voters' list under that name, but there was some ground for the necessary inferences.

Taylor applied for a ballot in the name of Shiriff. He took the oath and voted. He admitted afterwards having voted twice before on other names. The punishment provided for such an offence by the Dominion Elections Act, 1900, sec. 114, is a penalty of not more than \$200 and imprisonment for a term not exceeding two years and not less than three months. Some term of imprisonment must, apparently, be inflicted in case of conviction. In such cases there is not only danger of parties fleeing to avoid punishment, but that bail may be intentionally forfeited to avoid scandal. Taylor might be subjected to three prosecutions. Substantial bail must be required in his case particularly. Stewart's bail will be fixed at \$200 and two sureties in \$100 each, Stallan in \$400 and two sureties in \$200 each, and Taylor \$600 and two sureties \$300 each.

*Order for bail accordingly.*

*Note:—Bail in Criminal Cases.—Cr. Code secs. 603, 604.*

Bail is a delivery or bailment of a person to his sureties, upon their joining, together with himself, in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail. Blackstone's Com. Vol. 4, p. 296: "He that is bailed is, in supposition of law, still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time." 2 Hawkins, P.C. 124.

"If a person be bailed by insufficient sureties he may be required either by him who took the bail, or by any one who hath power to bail him to find better sureties, and on his refusal may be committed, for insufficient sureties are as none." Bacon's Abridg., title "bail." So, where it was sworn that bail was fictitious and utterly worthless, and the accused refused to state who they were, or where they were to be found, or that they had any existence, an order was made requiring him to find other sureties within four days, and put in good and sufficient bail before the judge making the order, and that otherwise the accused should be recommitted to gaol. *R. v. Mason* (1869), 5 Ont. Pr. 125, per Morrison, J.

The reason for committing persons to prison before trial is for the purpose of ensuring their appearance to take their trial, and the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. Hughes, Co. J., Elgin, in *R. v. Brynes* (1862), 8 U.C.L.J. 76; *R. v. Scaife*, 9 Dowl. P.C. 553. But it is necessary to see whether the offence is serious, and whether the evidence is strong, and whether the punishment for the offence is heavy. So where on a charge of arson the evidence was strongly presumptive of guilt, and there was evidence that the prisoner had endeavoured to purchase his escape from the custody of the constable who arrested him, the judge's discretion is properly exercised by refusing bail. *Ibid.* The probability of the accused voluntarily appearing to take his trial does not, in contemplation of law, exist when the crime charged is of the highest magnitude, the evidence in support of the charge strong, and the punishment the highest known to the law. In such case a judge will not interfere to admit to bail: *Baronnet's Case* (1852), 1 E. & B. 1; but when either of these ingredients is wanting, the judge has a discretion which he will exercise. *Ex parte Maguire* (1857), 7 Lower Canada Reports 57, per Power, Circuit Judge for the District of Quebec. But if these elements be combined in any case, bail will be refused. *Ex parte Corriveau* (1856), 6 Lower Canada Reports 249; *Ex parte Robinson* (1854), 25 Eng. Law & Eq. R. 215.

If a true bill has been found by the grand jury, that fact will have great weight in the question of admitting to bail, but it is not conclusive as to the prisoner's right to bail; and if upon reading the depositions

**Note—Continued.**

against him, they are found to create but a very slight suspicion of the prisoner's guilt, he should be admitted to bail, notwithstanding the refusal of the Crown officers to consent. *Ex parte Maguire* (1857), 7 L.C.R. 57.

If the depositions afford a presumption of guilt, at least so strong that a grand jury would in the opinion of the judge hearing the application for bail, find a true bill for murder against the accused, the application should be refused. *R. v. Mullady and Donovan* (1868), 4 Ont. Pr. 314, per Draper, C. J. Prisoners charged with murder will not be admitted to bail unless it be under very extreme circumstances, as where facts are brought before the court to shew that the indictment cannot be sustained. *R. v. Murphy* (1853), 2 N.S.R. 158. But the court has undoubted power to admit to bail in cases of murder. *Re Bartlemy*, 1 E. & B. 8.

The object to be kept in view is the ensuring the appearance of the parties and not the punishment, but the court cannot overlook the magnitude of the crime charged, and the probable testimony to be adduced in support. And in Newfoundland some of the persons charged with murder alleged to have been committed during a riot were admitted to bail on the postponement of their trial, where the witnesses for the defence, numbering about seventy, were engaged to prosecute their employment in the sea fishery and their detention would deprive them of their means of livelihood at the only season when they could earn it for themselves, the court discriminating as to the parties to be liberated on an analysis of the testimony. *R. v. Coady* (1885), *Morris' Newfoundland Decisions* 58.

In *Ex parte Baker* (1872), 3 *Revue Critique* (Quebec) 46, a verdict of wilful murder had been returned at a coroner's inquest, and a true bill subsequently found by the grand jury against the accused. He was tried and the jury differed in opinion and were discharged. It did not appear how the jury were divided, or what was the precise obstacle to their unanimity. Application was made by the prisoner's counsel for permission to give bail for his appearance to take another trial, and on the return of a writ of habeas corpus before the full Court of Queen's Bench (Duval, C.J., Caron, Drummond, Badgley and Monk, JJ.) the accused was admitted to bail, himself in £500, and two sureties for £250 each.

The mere circumstance that the accused is able to give any reasonable amount of bail which may be asked of him is not *per se* a ground for the application. *R. v. McCormick*, 17 *Irish Common Law Rep.* 411.

It is for the Court to exercise a sound discretion, and if satisfied that notwithstanding the ordering of bail, the prisoners are, in view of all the circumstances, likely to be forthcoming at the proper time to answer the charge, bail may be ordered. *R. v. Keeler* (1877), 7 Ont. Pr. 117, 120, per Harrison, C.J.; *R. v. Wood*, 9 *Ir. L.R.* 71; *R. v. Gallagher*, 7 *Ir. C.L.* 19; *R. v. McCartie*, 11 *Ir. C.L.* 188.

**Note—Continued.**

If the offence be not very serious and the depositions disclose no more than slender grounds of suspicion, bail may be allowed. *R. v. Jones*, 4 U.C.R. (O.S.) 18.

The court should not, on an application for bail, weigh and decide the question of credibility of witnesses. *R. v. Keeler* (1877), 7 Ont. Pr. 117, 123.

Where a habeas corpus has been issued, the court has power to admit persons to bail when accused of any felony, including murder. *R. v. Fitzgerald*, 3 U.C.R. (O.S.) 300; *R. v. Higgins*, 4 U.C.R. (O.S.) 83.

By 32 & 33 Vict. (Can.), c. 30 ss. 61 and 62 (now Cr. Code 604), any judge of a court of superior criminal jurisdiction in Ontario was empowered to act on an application for bail as if the party were brought before the full court for that purpose under a writ of habeas corpus. *R. v. Chamberlain*, 1 Can. Law Jour. 157. In habeas corpus proceedings, when the prisoner, with the depositions and warrant of commitment and the habeas corpus, are duly returned, the court are to consider whether they will discharge, bail, or remand him; and they may take a reasonable time for that purpose, and may bail him *de die in diem*, or direct him to be detained in custody until they shall have come to decision. Chitty's Criminal Law, Vol. 3, page 128. And if the court ascertain that there was no pretence for imputing to the prisoner any indictable offence, they will discharge him. *Ibid.* A judge cannot ascertain if there was a pretence for imputing an indictable offence unless the depositions are before him that he may judge whether the charge of the prisoner having committed such offence is well or ill founded; and a writ of habeas corpus should not issue where no depositions have as yet been taken by the magistrate, and the accused remains in custody on remand pending a preliminary inquiry before the magistrate, such remand having been granted to enable the prosecution to supply evidence in support of the charge. *R. v. Cox* (1888), 16 Ont. R. 228, per MacMahon, J. In the same case it was held that, although the statutory power of superior court judges to admit any person accused of felony or misdemeanour to bail "when they think it right to do so" (Criminal Procedure Act, R.S.C. 174 s. 83), gives authority to admit to bail in cases where the accused has not been finally committed for trial, bail should not be granted after the refusal of the magistrate to grant same, unless the court can say that he had not exercised a sound discretion in refusing it, or unless the depositions of the witnesses have been taken, by a perusal of which the court could judge of the nature of the case likely to be presented at the trial in case the prisoner were committed for trial. *R. v. Cox* (1888), 16 Ont. R. 228, 232, per MacMahon, J. Sec. 83 of the Criminal Procedure Act was the basis of the present section 603 of the Code, and although the saving clause, containing the words

**Note—Continued.**

quoted, has not been repeated in the Code enactment, it would seem that its omission has made no change in the law.

The Habeas Corpus Act, 31 Car. II., c. 2, s. 7, provides as follows :—  
“ That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol delivery after such commitment, it shall and may be lawful to and for the judges of the Court of King's Bench and justices of oyer and terminer or general gaol delivery, and they are hereby required upon motion to them made in open court the last day of the term, sessions or general gaol delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appears to the judges and justices, upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol delivery, and if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery, to be brought to his trial shall not be indicted and tried the second term, sessions of oyer and terminer and general gaol delivery after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.”

Under this statute the Crown is not obliged to do more than indict at the first assize after commitment, and have the prisoner tried at the second assize thereafter. *R. v. Bowen*, 9 C. & P. 509; *R. v. Keeler*, (1877), 7 Ont. Pr. 117, 123.

The assignment of that period by the statute is a declaration that in the absence of any special reason to the contrary, the prosecutor having had his vigilance excited by the prayer of the defendant in open court, should be allowed that period for preparing and getting up the case for the Crown, without having the safe custody of the prisoner interfered with. *R. v. McCartie*, 11 Ir. C. L. 194.

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE THE HONOURABLE MR. JUSTICE HALL.

## THE QUEEN V. SENECA.

*Inland revenue—Tobacco duties—Illegal possession of unstamped tobacco —Raw leaf cut by purchaser for his own use — “Manufactured tobacco,” meaning of—Inland Revenue Act (Can.), sec. 334.*

1. Under sec. 334 of the Inland Revenue Act (Can.) possession of domestic tobacco cut ready for use after purchase in the raw leaf is illegal unless the tobacco is put up in packages and the packages have revenue stamps attached.
2. Such possession is illegal, although the possessor is not a tobacco manufacturer or trader, and notwithstanding that he purchased same in the raw leaf entirely for his own use, and gave it no other process of “manufacture” than cutting up the raw leaf.

DECIDED: December 17, 1900.

Appeal by the prosecutor, Cinq-Mars, from a decision in the Special Sessions of the Peace, at Montreal, dismissing a complaint against Senecal, the respondent, for having in his possession manufactured tobacco not put up in stamped packages as required by law. The accused, a master carter in Montreal, was proved, by his own admission, to have had in his possession some ten or twelve pounds of domestic tobacco which he had bought “in the leaf” in the market there for his own use, and part of which he had cut ready for use.

The present complaint was brought under sec. 334 of the Inland Revenue Act, which reads as follows: “Except as herein specially provided, every person who sells or offers for sale, or, not being a licensed tobacco or cigar manufacturer, has in his possession any kind of manufactured tobacco or cigars not put up in packages and

stamped in accordance with the provisions of this Act, shall be guilty of a misdemeanor and shall incur a penalty not exceeding \$500, or not less than \$50, and the tobacco so found shall be forfeited to the Crown," etc.

It was admitted that the cut tobacco was not put up in a stamped package, but it was contended that the section of the Act in question was intended to apply to the case of a manufacturer or trader, and not, as in the present case, to a person not engaged in any way in the manufacture or sale of tobacco, and who had bought a supply of leaf tobacco solely for his own use. The presiding magistrate in the Court of General Sessions of the Peace adopted this view and dismissed the complaint.

MONTREAL, December 17, 1900.

HALL, J.—

Although the literal reading of sec. 334 of the Act seems to make no distinction in its application, the impression from a first consideration of it leads one to conclude that it could not have been intended to prohibit a person from keeping in his private house a supply of tobacco for his own use, prepared by himself merely by cutting up the raw leaf, the sale and purchase of which, in the open market, is not only not prohibited, but upon which no tax or license is attempted to be imposed.

It would be practically impossible to enforce a system of license upon those who grow the raw leaf, and equally impossible to interfere in the sale of tobacco in the leaf, owing to the difficulty in its identification. The system adopted by the Government is not free from objection. It is both awkward and arbitrary. It makes no attempt to

enforce a tax upon the raw material, or to require a license for its sale, but it insists that from the moment the leaf is manipulated or manufactured, or changed so that it can be used, the tobacco, in whatever form it may then be, shall be enclosed in packages of wood or metal in forms designated by the Act (sec. 260), and each of these packages shall have affixed to it a revenue stamp proportioned in value to the weight of the tobacco thus put up, and the sale or use, or even the possession of manufactured tobacco, not put in such packages and not thus stamped, is punishable, under the original Act by fine, and under the amended Act by fine and imprisonment. The effect of this is, that although theoretically there is no impediment in the sale and purchase of raw leaf tobacco in the open market, such purchase is practically prohibited by any except the dealer or manufacturer, because a private individual cannot use it, without exposing himself to the penalties of the Act. This is exactly what was intended by the Act, and its provisions, so long as they remain unrepealed, must be recognized and enforced. The consumer must, therefore, get his supply from the manufacturer or through the middleman, the tobacco merchant, and in the form of a stamped package, and his possession, in any other form, of tobacco prepared for use is a violation of sec. 334 of the Act, and exposes him to its penalties.

The only exception contained in the Act is the case of the person who has grown tobacco on his own land, and who is authorized by sec. 303 to prepare it for his own use to the extent of thirty pounds for each adult member of his family, but who has to take out a license and pay a tax for the privilege of converting his surplus even into common Canada twist, and who would expose himself, like any other person, to the full penalty of the Act if he used himself the surplus of his production over the thirty



pounds limit, or who sold to any one else any manufactured tobacco, the growth even of his own land (sec. 302).

Entertaining this view of the Inland Revenue Act and its application, I am of opinion that section 334 must be interpreted exactly according to its terms ; that the present appeal must be maintained with costs ; the decision of the trial magistrate set aside, and the respondent declared guilty of the offence charged in the complaint.

As there is no evidence of bad faith on his part, I impose the lowest penalty stipulated by the section of the Act under which the prosecution is taken. The respondent is condemned to the payment of a fine of \$50 and costs, and imprisonment for three months in case of non-payment, and the tobacco seized is declared to be forfeited.

*Appeal allowed.*

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE ROULEAU, J.

## THE QUEEN v. WHIFFIN.

*Conviction—Several offences—Inclusion where statute authorizes joinder in information—Form of conviction—Unauthorized punishment—Hard labour—Amended conviction—Variation from adjudication—Review of evidence on certiorari for purposes of amendment—Adjudication de novo—Exercising magistrate's discretion—Costs in certiorari proceedings—Con. Ord. N. W. T., ch. 89, sec. 102—Cr. Code, 889.*

1. Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence.
2. Where on a summary conviction the magistrate imposes imprisonment at hard labour on default in paying the fine upon a charge in respect of which the law does not authorize hard labour to be imposed, the magistrate may return, in answer to a certiorari, an amended conviction omitting the unauthorized part of his adjudication, and the amended conviction will not be bad by reason of such variance from the original minute of adjudication.
3. A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed.
4. Under Criminal Code sec. 889, the Court may adjudicate de novo on the evidence given before the magistrate in cases removed by certiorari; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate.
5. Where a magistrate returns an amended conviction in certiorari proceedings and the conviction is sustained only by reason of the amendment, costs of the certiorari proceedings should not be awarded against the applicant.

DECIDED: May 14, 1900.

APPLICATION to quash a conviction against one Alfred E. Whiffin who was convicted on the 5th July, 1899, of having unlawfully sold intoxicating liquor without a license, and of having kept intoxicating liquor for the purpose of sale without a license, on the following grounds:

1. That the conviction was bad in law inasmuch as it was for two offences; 2. That the said conviction was bad in law inasmuch as it imposed hard labour in default of payment of the fine imposed or of sufficient distress; 3. That the conviction was bad in law inasmuch as it varied from the minute of adjudication; 4. That the minute of adjudication did not disclose the commission of any offence in law.

The minute of adjudication was in these words: "It is this day adjudged by the Court that the accused Alfred E. Whiffin be convicted of the charge of selling intoxicating liquor and of keeping the same for sale, and that the accused Alfred E. Whiffin be fined the sum of fifty dollars for each offence and the costs of the Court five dollars and thirty-five cents, and in default of payment to two months' hard labour in the guard room at Maple Creek, N.W. Mounted Police."

The original conviction provided for distress and sale of defendant's goods, and in default of sufficient distress two months' imprisonment at hard labour. In the amended conviction the distress clause and hard labour were omitted.

*James Muir, Q.C., for the Attorney General.*

*R. B. Bennett, for the defendant.*

CALGARY, May 14, 1900.

ROULEAU, J.—

Under sec. 102 of ch. 89 of the Consolidated Ordinances several charges of contravention of this Ordinance may be included in one and the same information or complaint, and under sec. 106 convictions for several offences may be made although committed on the same day. The amended conviction returned into Court adjudged "the said Alfred

E. Whiffin for each of his said offences to forfeit and pay the sum of fifty dollars," which the J.P. was authorized to do under said sec. 106. Unless the statute would prohibit such conviction, I do not think that a court of justice would quash it on that ground: *The King v. Swallow*, 8 Term Rep. 284.

The second ground of objection has been remedied by the amended conviction.

The third ground of objection is that the conviction is bad in law because it varies from the minute of the adjudication inasmuch as the minute of adjudication imposed imprisonment at hard labour, which is not authorized by the Ordinance, and the amended conviction imposes only imprisonment.

I am of the opinion that, in view of Art. 889 of the Criminal Code and the late decisions given in cases similar to this, the Judge would have power to amend a conviction if it followed the adjudication in which the magistrate would impose imprisonment at hard labour when he was only authorized to award imprisonment without hard labour. At all events, according to numerous decisions, the magistrate has certainly the right to omit such an error in his formal conviction. This is what he did in this case. Amongst other cases, I may cite the following, which are very much in point: *Reg. v. Hartley*, 20 Ont. R., 481; *Reg. v. Richardson*, 20 Ont. R., 514; *Reg. v. McCay*, 23 Ont. R., 442.

If any other ground of objection could have been sustained, I think the fourth ground might have been argued with success, but I am of the opinion that this ground is not tenable now in view of sec. 889 of the Criminal Code, which says that "No conviction or order made by any Justice of the Peace shall, on being removed

by certiorari be held invalid for any irregularity, informality or insufficiency therein, provided the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction," etc., etc. This, no doubt, gives me the right to adjudicate de novo on the evidence given before the magistrate. But I may add that I am of the same opinion as that expressed in *Ex p. Nugent*, 1 Can. Cr. Cas., 126, that the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate; also that where the only penalty authorized has been imposed, but with an unauthorized addition the latter may be struck out on amendment after its return under certiorari.

For these reasons this application is refused without costs. My reason for not granting costs is that costs of certiorari proceedings are not usually given where the conviction is amended and affirmed in the amended form: *R. v. Higham*, 7 El. & Bl. 557.

*Amended conviction affirmed.*

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE HALL, J.

## THE QUEEN V. LEPINE.

*Preliminary enquiry—Manner of taking depositions—“Full opportunity to cross-examine” witnesses—Reading to witness former deposition taken in the absence of the accused—Motion to quash indictment for irregularity in depositions—When is an accused “given in charge” to the jury—Criminal Code, secs. 590, 596, 687, 641.*

1. The expressions “entitled to cross-examine” and “full opportunity to cross-examine” as used in Criminal Code, secs. 590 and 687, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanor while testifying.
2. When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law.
3. Where the depositions before the magistrate have not been taken according to law, and a material provision of the law has not been complied with, the indictment may be quashed under Criminal Code, sec. 641 upon motion at any time before the accused is given in charge to the jury.
4. An accused person cannot be said to have been “given in charge” to the jury until the jury are sworn, and his arraignment and the pleading of Not Guilty to the indictment do not constitute a “giving in charge.”

DECIDED : December, 1900.

TRUE bills were found against Lepine, Whelan, McDonnough, Labelle, Phillips and Baynes at the November Term on three indictments, namely: For theft with a count for receiving, for forgery with a count for uttering, and for conspiracy with intent to defraud. Labelle

pleaded guilty to the three indictments, Phillips disappeared before pleading, and the other prisoners pleaded not guilty.

The accused Baynes moved to quash all three indictments in so far as he was concerned on the following grounds :—

1. Because the indictments were submitted to the Grand Jury without any proper legal authority.

2. Because the indictments were submitted to the Grand Jury without any preliminary investigation had before any magistrate as regards the charges made against the said Baynes as required by law.

3. Because the indictments are not founded on facts or evidence disclosed on depositions taken according to law before the Justice.

*Campbell Lane*, and *M. J. F. Quinn*, Q.C., for the accused Baynes, in support of the motion: Art. 640, Criminal Code, provides "The accused may at any time before he is given in charge to the jury, apply to the Court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the Court shall quash such count if satisfied that it is not so founded." The words "such facts or evidence" manifestly apply to the last preceding sentence in the article, viz., "the facts or evidence disclosed on the depositions." The accused Baynes was charged with, and committed by the magistrate, upon a charge of uttering a forged instrument. If this committal was not preceded by a proper preliminary inquiry as provided by law, the committal is of no avail, inasmuch as the other conditions necessary for the laying of an indictment, viz., the written consent of a Judge, the direction of the Attorney-General, order of the Court, or the binding over of the prosecutor under Art. 595 of the

Criminal Code, are absent, and Art. 641 strictly limits the conditions under which indictments can be laid before the Grand Jury. In regard to the indictments for theft and conspiracy these could only be laid before the Grand Jury if founded on facts or evidence disclosed on the depositions taken before the magistrate in the charge of uttering with which the accused Baynes was charged. If there were no depositions legally taken before the magistrate, it is manifest that there can be nothing to justify these two latter indictments. The preliminary inquiry before a magistrate is a judicial proceeding, and the committal a judicial decision. It has, therefore, to be conducted according to the strict rules laid down in the Code: Art. 590 par. 2 Cr. Code enacts that "The evidence of the said witnesses *shall* be given upon oath and in the presence of the accused; and the accused, his counsel, or solicitor *shall* be entitled to cross-examine them." This Article should be read side by side with Art. 687 Cr. Code in order to shew what "entitled to cross-examine" means. The latter article shews what the law regards as essential in depositions taken on preliminary inquiries, and under what circumstances alone they can be read at the trial in case of the death, etc., of the witness, and it requires, as one of the essential conditions, that it be proved "that such deposition was taken in the presence of the accused, and that he, his counsel, or solicitor, had a full opportunity of cross-examining the witness." Read together it is obvious that the accused is entitled to have a *full opportunity of cross-examining the witnesses*. This opportunity is regarded as equally essential as the presence of the accused when the deposition is taken.

"Full opportunity to cross-examine" implies the actual seeing of the witness as he testifies, and the hearing of his words as they fall from his lips.



As to the necessity of following the Statute in taking depositions before the magistrate we refer to Archbold, 20th ed., p. 290: *Regina v. Carbray*, 13 Q.L.R. p. 100.

As to the committal of a prisoner being a judicial decision: *Regina v. Cavalier*, 1 Can. Cr. Cas. p. 134; *Re Guerin*, 16 Cox C.C. p. 596.

As to the strictness of procedure in preliminary examinations before justices being made in favour of the accused: *Re Nunn*, 2 Can. Cr. Cas. p. 429; *Re Guerin*, 16 Cox C.C. 596.

On the practice of reading over to a witness depositions of the witness taken in cases in which the prisoner was not present: For the history of the legislation on the subject—Archbold, 20th ed., p. 290; Roscoe, 12th ed., p. 62; Taylor on Evidence, 8th ed., 1887, pp. 437 and 439.

As to the necessity of affording the prisoner an opportunity of hearing the evidence delivered by a witness as it falls from his lips, and the necessity of having a full opportunity to cross-examine: Criminal Code, Arts. 590 and 687; *Rex v. Forbes*, Holt's N.P.R. p. 599; *Regina v. Johnson*, 2 Carrington & Kirwin's Reports p. 394; *Regina v. Walsh*, 5 Cox C.C. p. 115; *Regina v. Beeston*, Dearsley's Crown Cases p. 405, and remarks of Alderson, B.; *Regina v. Milloy*, 6 Legal News p. 95; *Re Guerin*, 16 Cox C.C. 596; *Regina v. Bertrand*, L.R. 1 P.C. 520, 16 L.T.R. (N.S.) p. 752.

*J. P. Cooke*, Q.C. for the Crown, contended that the motion to quash, under Art. 641 of the Criminal Code was not a remedy applicable in the present circumstances.

If any such had at any time existed, the proper method would have been by way of habeas corpus, and, in any event, the motion did not lie at this stage, the accused having been given in charge to the jury, and Art. 641 restricted the motion to periods before that occurrence.

*Lane*, in reply, submitted that the object of Art. 641 was to afford a remedy in such cases as the present, and that the accused could not be said to be given in charge to the jury at a stage in the proceedings when not even one jurymen had been called.

MONTREAL, December, 1900.

HALL, J.—

The facts of this case, briefly stated, are these. A charge of theft of a cheque was first made against three of the present accused parties A. B. C. They were arrested and brought before the police magistrate and a number of witnesses examined in their presence in support of the charge and an opportunity given them to cross-examine. From circumstances developed in this examination, it was thought that other offences had been committed involving not only the persons then undergoing their trial, but two others D. and E. Accordingly the proceedings in the charge for theft were suspended and new complaints made against all five of the present accused parties charging them with the forgery of a cheque and with conspiracy. All five were arrested and brought before the same police magistrate for trial. As the new complaints were based in part upon the evidence already taken, it was decided, instead of re-examining the witnesses, to bring them up separately, administer the oath to them, and then read over to them the shorthand notes of the depositions already taken, asking each in turn if they were correct and then calling upon the accused to cross-examine. Counsel for D., one of the accused not included in the first charge, protested against this procedure upon the ground that the witnesses had not been examined in his client's presence and that he could not therefore properly cross-examine

them. The objection was overruled but formally entered in the record. Some additional witnesses were examined and the accused were all committed. Indictments were brought in against them by the Grand Jury and all were arraigned and pleaded not guilty. Upon the case coming on for trial upon the indictment charging them with forging a cheque and before a jury had been sworn, D.'s counsel moved to quash the indictment upon the ground that his client had been committed without any legal evidence having been brought against him. After argument motions to quash were submitted by all the others of the accused—by E. upon the same ground invoked by D. and by A. B. C. upon the ground that the evidence although taken in their presence had not been taken under the complaint upon which they had been committed.

Counsel for the Crown contended, *in limine* that the motions were too late as not being made "before the accused had been given in charge to the jury" (sec. 641 Criminal Code). This objection appears to me not to be well taken. The accused cannot be said, strictly speaking, to be "given in charge to the jury" until the jury is sworn. Technically, I think it would have been more regular for the accused's counsel to have moved to withdraw the plea of "not guilty" before submitting the motions, but it would have been only a technicality as such motions are always favourably considered. I think the accused are within their rights in moving to quash the indictments at this stage of the case.

Upon the merits, I am of opinion that the motions must be granted and the indictments quashed. There has never been a time, since the abolition of the Star Chamber system of trial, when a person accused of an indictable offence in an English Court has not been entitled to hear the evidence brought against him and to cross-examine the witnesses;

and no evasion or variation of that rule has ever been sanctioned when brought before the attention of the Superior Courts. The authorities submitted by Mr. Lane support this position to the fullest extent. Section 590 of our Criminal Code is not therefore new law, and sub-sec. 2 is as concise and emphatic as though copied from the original Bill of Rights. "The evidence of the witnesses" [in a preliminary inquiry before a justice] "shall be given upon oath *and in the presence* of the accused, and the accused, his counsel or solicitor, shall be entitled to cross-examine them." To give the accused an opportunity of hearing the words which a witness may have uttered out of his sight and hearing is to give him only half his rights. The expression and manner of the witness while testifying, his emphasis upon certain words, his eagerness or reluctance are perhaps more important than the utterances themselves in giving to an accused or his counsel, a correct impression of the reliability to be attached to the evidence, and the clue to the weak spot in the witness's character or statement. Those of the present accused who were not included in the first charge and were not present when the evidence was taken have been deprived of this advantage and have been denied this right. As to the others, the objection is more technical, but in my opinion none the less fatal. They too did not hear the witnesses examined upon the preliminary charge which formed the basis of the indictment upon which they are now being tried. They may have considered the evidence adduced upon the first charge too irrelevant, or too trivial, to make a cross-examination necessary. Whatever reason might have influenced them it is not now for us to consider, nor to be convinced that they have suffered an actual injury. It is enough for the purposes of the present motions to feel that they may have sustained an injury and that, under

the strict provisions of our criminal law, is sufficient to entitle them to be relieved of a commitment thus irregularly made.

The prosecuting attorney answers these motions by saying that if the proceeding was irregular, advantage should have been taken of it by a writ of habeas corpus, but now that indictments have been found against the accused the previous defects if any have been cured. This argument would probably have been effective prior to the adoption of our present Criminal Code. Under the system, or lack of system, then in force, it was permitted to lay charges before a Grand Jury and to ask and obtain indictments without any preliminary commitment or even inquiry. As a previous investigation before a magistrate was not an essential condition, it is obvious that an alleged irregularity in case of such enquiry would not be a fatal objection to an indictment which was in whole or in part a sequel to it and that the only remedy of the accused person would be to seek to quash the commitment under a writ of habeas corpus. All that procedure is changed by the Code, which by sec. 641 requires a previous commitment or the order of the Attorney-General or the consent of a judge as an essential preliminary condition before a charge can be laid before a Grand Jury, and the same section provides the remedy which the present application demands. "The accused may at any time before he is given in charge to the jury apply to the Court to quash any count in the indictment not founded on such facts or evidence." To what facts and evidence does this clause apply? Clearly to facts and evidence taken under the stipulation of sec. 590 that is "in presence of the accused." As a portion of the evidence on this preliminary enquiry was not thus taken, I hold that there was no legal commitment and hence that the indictment lacked the essential

condition of sec. 641 and is as irregular and illegal as though it had been submitted to the Grand Jury without even the form of a previous commitment.

The motions are therefore granted and the indictments quashed.

*Indictments quashed as to all defendants.*

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SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, VANWART AND  
McLEOD, JJ.

**Ex parte HEBERT.**

*Calling presiding magistrate as a witness—Application must be bona fide—Requirements of affidavit in support—Refusal of magistrate to be sworn—Certiorari to quash conviction—N.B. Liquor License Act (1896), s. 104.*

1. The Liquor License Act of New Brunswick, by providing that a summary conviction for selling liquor without a license shall be "final and conclusive," takes away the right of certiorari, except as regards the jurisdiction of the magistrate.
2. Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony.
3. Where on an application to quash a summary conviction on the ground that the magistrate refused to give evidence on the trial before himself, the Court is satisfied, from the magistrate's affidavit and the evidence taken in the proceeding, that the magistrate was not a material witness and that the application to have him sworn as such was not made bona fide, the conviction should not be disturbed.

ARGUED: January 28, 1898.

DECIDED: April 23, 1898.

The defendant was convicted before R. H. Davis, Stipendiary Magistrate for the parish of Richibucto, on the first

day of November, 1897, of selling intoxicating liquor contrary to the provisions of the Liquor License Act, 1896, and was fined fifty dollars.

Mr. Justice HANINGTON in vacation granted an order nisi for a certiorari with a view to the conviction being quashed.

The grounds upon which the order was granted were :

1. That Charles S. Weeks, the real complainant, is a nephew-in-law of the presiding magistrate, who is thereby disqualified from hearing the case.

2. Improper rejection of the evidence of Weeks of a resolution against Hebert, passed by the Sons of Temperance.

3. Information having been laid at the request of Weeks, who receives a salary out of the license fund and is related to the magistrate.

4. The magistrate having been called as a witness to give evidence he becomes disqualified, and another magistrate should have been called to try the case.

5. Proceedings were taken at the request of the Sons of Temperance, and Weeks and Lawson, being members of the division of the Sons of Temperance, and being informants and pecuniarily interested, the conviction is bad.

FREDERICTON, N.B., January 28, 1898.

*White*, Attorney-General, shewed cause.

*Phinney*, Q.C., supported the order nisi.

FREDERICTON, N.B., April 23, 1898.

The judgment of the Court was now delivered by

TUCK, C.J.—

I have read the evidence given before the magistrate

and am satisfied that the charge made against Hebert was fully proved.

By section 104 of the Liquor License Act, 1896, it is enacted that "in all cases of prosecution for any offence against any provisions of this Act for which any penalty or punishment is prescribed, a conviction or order of the said justices or police magistrates, as the case may be, except as hereinafter provided, shall be final and conclusive, and except as hereinafter mentioned, against such conviction or order there shall be no appeal." The only exception where there has been a conviction under this Act is where the person convicted is a licensee, or in respect of premises licensed under the Act. In such cases an appeal shall lie to the Judge of the County Court of the county in which the conviction is made, sitting in chambers without a jury. Provision is made as to the manner in which the appeal shall be prosecuted. It seems to me that as a conviction against a person selling without a license is made final and conclusive, certiorari is in effect taken away. By sec. 100 the police magistrate or justices trying the case are made the final judges of the sufficiency of the evidence to establish the infraction of the law complained of. By sec. 101 it is provided that when a person is charged with selling without a license it is incumbent upon him to prove that he is duly licensed. This being the law, I think that some of the points taken for a certiorari are not arguable.

The only question is: Had the magistrate jurisdiction to convict? It is said that Charles S. Weeks, called an assistant inspector, is the real prosecutor; that he is a relation of the magistrate who tried the cause, and that this relationship rendered the magistrate incompetent to act. The Rev. William Lawson laid the information, and he makes affidavit that he made the complaint at his own



instance, and not at the instance of any division of the Sons of Temperance, or any other organization, or any other person or persons. That the matter of the prosecution was never brought up in the Kingston division of the Sons of Temperance, or any other place, and discussed, to his knowledge, and that in making the complaint he acted entirely on his own responsibility, and for the purpose of vindicating the Liquor License Act of 1896. I believe this affidavit of Mr. Lawson, and that he was the real informer and acted bona fide.

The rejection of a question put to Weeks is not a ground for certiorari. The information was not laid at the request of Weeks, and whether or not he receives his pay or salary out of the license fund, or is related to the magistrate, does not make this conviction bad.

The mere calling of Robert H. Davis, the police magistrate who tried the cause, to give evidence, did not disqualify him, and he did not thereby cease to have jurisdiction.

The defendant appeared by counsel and was himself present during the whole trial. He did not give evidence nor did he call any other witness except Mr. Davis. I am convinced, notwithstanding his affidavit to the contrary, that Hebert's application to have the magistrate called as a witness was not made bona fide. It was admitted at the trial that the magistrate was a ratepayer in the parish where the case was tried, but that does not disqualify him. It appears from the return that Mr. Carter, who appeared for the defendant, proposed to call the presiding magistrate as a witness, and that another magistrate be called in to finish the case. Mr. Sayre, for the prosecution, opposed this application unless Mr. Carter would state the nature of the evidence which the police magistrate would give. Mr. Carter would only state in a general way that the

evidence he proposed to give by the magistrate had relation to certain proceedings which took place in Richibucto division,\* and certain acts and conversations between the members of the division, or some of them, as to the matter of Pascal Hebert and the institution of proceedings against him for selling liquor contrary to law. The application to examine the magistrate was supported by an affidavit of the defendant. The presiding magistrate refused the application because he considered the affidavit of Hebert insufficient, because it simply states that Mr. Davis is a material and necessary witness without stating specifically what he meant to prove by the witness.

In an affidavit which was read before the Court, Mr. Davis swears that the matter of the complaint was never at any time brought up or discussed by the complainant and Charles S. Weeks and himself in the Kingston division, or any other division of the Sons of Temperance, or in any other place; nor was it discussed in his presence or hearing by other persons; that he has no knowledge that a committee was ever appointed to have such proceedings taken, and that he never heard of Weeks being one of such committee, and that he had no bias against the defendant on the trial. Weeks in his affidavit says that Robert A. Irving, clerk of the County Court, conducted the proceedings for any violation of the Act, and had full direction of this case before the magistrate; and that he, deponent, took no part therein except to give evidence when he was called upon by the counsel of Pascal Hebert; that Mr. Lawson, the complainant, did speak to deponent and said that he had evidence that Pascal Hebert had sold liquor without a license, and said that he would lay an

\* N. B.—The local organizations or lodges of the society known as the "Sons of Temperance" are called "divisions."

information against him, and that he, deponent, told Mr. Lawson that he had a perfect right under the law to do so.

From all the evidence I am convinced that these proceedings against Hebert were not taken at the request of any division of the Sons of Temperance, or any committee thereof. On the contrary, I think that the Rev. Mr. Lawson made the complaint on his own responsibility, and without direction or request by anyone. Being fully of opinion that the defendant was convicted according to law for a violation of the statute, the rule or order for certiorari must be discharged.

HANINGTON, VANWART and MCLEOD, JJ., concurred.

*Order nisi discharged.*

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## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MACMAHON AND ROSE, JJ.

## THE QUEEN V. ARCHIBALD.

*Aggravated assault—Maliciously inflicting grievous bodily harm—Jurisdiction of magistrate in Ontario—Consent to summary trial—Limit of sentence—Cr. Code secs. 262, 783, 785, 788.*

1. On a charge under Cr. Code sec. 783 (c) of aggravated assault with grievous bodily harm, a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions.
2. In order to constitute "grievous bodily harm" it is not necessary that the injury should be either permanent or dangerous; and an injury is within the meaning of the term if it be such as seriously to interfere with comfort or health.

DECIDED: December 8, 1898.

The accused was convicted before George Burden, Esquire, a Police Magistrate for Algoma district, "for that he, the said Robert Archibald, did at Markville in said district on or about the 25th day of June, 1898, commit an aggravated assault upon the person of one William Crebo," and the said Robert Archibald having elected to be tried summarily, for his said offence was adjudged to be imprisoned in the Central prison, Toronto, for a period of twelve calendar months.

An order nisi was granted by the Divisional Court on October 6, 1898, calling upon the magistrate and the informant to shew cause why the conviction should not be quashed upon the following grounds:

1. That the adjudication of imprisonment for twelve months is contrary to law.
2. That there was no jurisdiction in the magistrate to

convict, there being no evidence that the accused did commit an aggravated assault within the meaning of the Criminal Code.

3. That the said conviction is in excess of the jurisdiction and powers conferred upon the convicting magistrate by the statute.

4. That the information and conviction are invalid for uncertainty in not specifying the act complained of.

*Masten*, for prisoner.

*Cartwright*, Q.C., for the Crown.

TORONTO, December 8, 1898.

The judgment of the Court was delivered by

MACMAHON, J.—

The information charged the committing by the prisoner of an aggravated assault, and when he was brought before the police magistrate and asked if he desired that the case should be sent for trial by a jury at the next Court of Quarter Session at Sault Ste Marie, he answered that he wished it to be tried summarily.

By section 783, whenever any person is charged before a magistrate:

(c) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person either with, or without a weapon, or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person, the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

By section 785, if any person is charged in the Province of Ontario before a police magistrate in any county in

such province, with having committed any offence for which he may be tried at the Court of General Sessions of the Peace, or if any person is committed to a jail in a county, district or provisional county under the warrant of any justice of the peace for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and if found guilty be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. And by section 788, "In any case summarily tried under paragraphs (c), (d), (e), (f), (g), (h) or (i) of 783, if the magistrate finds the charge proved he may convict the person charged and commit him to the common jail or other place of confinement there to be imprisoned with or without hard labour for any term not exceeding six months, or may condemn him to pay a fine not exceeding with the costs of the case one hundred dollars, or both fine and imprisonment not exceeding the said sum and term," etc.

Then what amounts to grievous bodily harm which will constitute an aggravated assault within sec. 783 (c)? In *Reg. v. Ashman* (1858), 1 F. & F. 88, Willes J. says that in order to constitute grievous bodily harm "it is not necessary that the injury should be either permanent or dangerous, if it be such as seriously to interfere with the comfort or health it is sufficient." And in the much discussed case of *Reg. v. Clarence* (1888), 22 Q.B.D. 23, where the effect of sec. 20 of 24-25 Vict., c. 100 (Imp.)—our Act R.S.C. ch. 162, sec. 14—that which provides that "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon, or instrument, shall be guilty of a misdemeanor," was considered by Mr. Justice Wills, at p. 36, who expressed the opinion that "the section points to

the infliction of direct and intentional violence, whether with a weapon or the fist or the foot, or any other part of the person or in any other way not involving the use of a weapon, as for instance by creating a panic at a theatre whereby people trampled on one another. *Reg. v. Martin*, 8 Q.B.D. 54." And Mr. Justice Stephen, in the same case, at p. 41 says: "The words appear to my mind to mean the direct causing of some grievous bodily harm to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing the person down." And at p. 45 he furnishes this further illustration as to what constitutes an assault which might result in grievous bodily harm: "If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in."

In the present case there is no doubt that Crebo, the prosecutor, was severely injured, being knocked down, one eye blackened, his face bruised, and he was kicked, as he says himself, all over the body, and according to the evidence of Joseph Rickeby, Crebo "was bruised about the head and face, his face was swollen and sore for about a week."

On this evidence, according to the authorities, it is clear the police magistrate was justified in finding that the prisoner was guilty of an aggravated assault upon the prosecutor.

Then the only remaining point to be considered is whether the magistrate exceeded his jurisdiction in committing the prisoner to jail for a term exceeding six months. This is not an offence which under sec. 540 of the Code is within the exclusive jurisdiction of the superior Courts, and it is, therefore, triable by Quarter Sessions, by virtue of sec. 539, which provides that every Court of General or

Quarter Sessions when presided over in Ontario by a County or District Court judge has power to try any indictable offence except those mentioned in sec. 540. And sec. 262 provides that "Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence, and is liable to three years' imprisonment." And by sec. 785, a police magistrate trying any offender for an offence for which he may be tried at a Court of General Sessions of the Peace, if found guilty may be sentenced by such magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. The original enactment of sec. 262 of the Code was 32 & 33 Vict., ch. 20, sec. 47 (R.S.C. ch. 162, sec. 35), and sec. 783 is a re-enactment of 32 & 33 Vict., ch. 32, sec. 27 (R.S.C. ch. 176, sec. 3), while sec. 785 was first enacted by 38 Vict., ch. 47, sec. 1 (R.S.C. ch. 176, sec. 7), and the jurisdiction thereby conferred on police magistrates is confined to the Province of Ontario, and was subsequent to the other enactments referred to. The jurisdiction therefore existed in the police magistrate to sentence the prisoner to the term for which he was sentenced, namely, to twelve months imprisonment. That was the view entertained in *Reg. v. Boucher*, 8 Ont. Pr. 20, 4 Ont. App. 191, and in the recent case of *Reg. v. Conlin*, 29 Ont. R. 28.

The writ of certiorari will be superseded, and there must be judgment for the Crown, affirming the conviction.

*Conviction affirmed.*

**Note:** *Aggravated assault—Summary trial—Cr. Code, ss. 783, 785, 788.*

By the Criminal Code Amendment Act of 1900 (in force January 1, 1901), any doubt as to the application of Code, s. 788, to summary trials by police or stipendiary magistrates in Ontario under s. 785 has been removed, and the law declared in accordance with the above decision. That Act, 63 Vict. (Can.) c. 46, s. 3 (sched.), adds a sub-section to s. 785 of the Code, and declares that s. 788 does not



**Note—Continued.**

“extend or apply to” cases tried under s. 785, and that where the magistrate has jurisdiction by virtue of s. 785 only, a person shall not be summarily tried thereunder without his own consent. The extended powers of police and stipendiary magistrates in Ontario were, by the same statute (new s.-s. 2 of Code, s. 785), conferred upon police and stipendiary magistrates of *cities and incorporated towns* in every other part of Canada, and upon recorders entitled to exercise judicial functions.

In *R. v. Boucher* (1879), 8 Ont. Pr. 20, affirmed *Re Boucher* (1879), 4 Ont. App. 191, the conviction was for unlawfully and maliciously cutting and wounding with intent to do grievous bodily harm. It was held by Hagarty, C.J., 8 Ont. Pr. 20, that although the conviction could not be treated as one for a felony (there being no charge that the act was done “feloniously”), the statement of the intent might be treated as surplusage, and that there was a good conviction for the statutory misdemeanor of malicious wounding, under 32-33 Vict. (Can.) c. 20, s. 19. That statute enacted that “Whosoever unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor, and shall be liable to be imprisoned in the penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.” Boucher’s offence was one which might have been tried at a court of General Sessions of the Peace, and under the Act of 1875, 38 Vict. (Can.) c. 47, s. 1, a police magistrate in Ontario, trying the case summarily with the prisoner’s consent, had the power to impose the same punishment as the prisoner would have been liable to if he had been tried before the court of General Sessions. *Re Boucher* (1879), 4 Ont. App. 191, 196.

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## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FERGUSON, J., IN CHAMBERS.

## THE QUEEN v. RANDOLPH.

*Theft of money—Amount less than \$10—Summary trial before police magistrate—Limit of punishment—Offence not charged as “stealing from the person”—Warrant of commitment not amendable where punishment excessive—Application of Cr. Code, s. 889—Conviction on “summary trial” not curable if punishment excessive—Power on habeas corpus to order further detention—Cr. Code, ss. 344, 752, 785, 786, 787, 800, 889.*

1. A person accused of the theft of a sum of money less than \$10, not charged as a “stealing from the person” (Cr. Code, s. 344), is liable, on his summary trial with his own consent before a police magistrate, to no greater term of imprisonment than six months (Cr. Code, s. 787).
2. Where a conviction by a police magistrate on a “summary trial” of the accused under part 55 of the Code imposes a longer term of imprisonment than is authorized by law, the warrant of commitment cannot be amended, as in such case there is not “a valid conviction to sustain the same” (Cr. Code, s. 800).
3. Where the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by Cr. Code, s. 752, of making an order for the further detention of the accused.
4. The provisions of Cr. Code, s. 889, as to reducing a punishment imposed by a justice of the peace where the same is in excess of that which might lawfully have been imposed, apply only to cases of “summary convictions” under part 58 of the Code, and not to “summary trials” by a police magistrate under part 55.

ARGUED: October 26, 1900.

DECIDED: October 31, 1900.

MOTION, on the return of a writ of habeas corpus, for the discharge of the prisoner, John Randolph, who had been committed to the Central Prison by R. E. Kingsford, Esquire, Deputy Police Magistrate for Toronto, for one year and 364 days.

The prisoner was tried before the Deputy Police Magistrate acting for and at the request of the Police

Magistrate for Toronto, consented before the magistrate to be tried summarily, and pleaded not guilty. The prisoner was examined as a witness on his own behalf at the trial, and under oath denied the charge, and the evidence was in other respects conflicting. The evidence of the prosecutor was to the effect that the accused had snatched the money out of her hand while visiting at her house. He was convicted on October 1, 1900, "for that he the said John Randolph, on the 26th day of September, 1900, did in the said City of Toronto unlawfully steal the sum of five dollars in money, the property of Jennie McCoy, contrary to the form of the statute in such case made and provided."

After conviction, and before sentence, the prisoner admitted that there were prior convictions against him. The Deputy Police Magistrate thereupon sentenced him to be imprisoned in the Central Prison for the Province of Ontario and there to be kept to hard labour for the term of one year and three hundred and sixty-four days.

TORONTO, October 26, 1900.

*DuVernet* for the prisoner: The sentence could not legally be for more than six months' imprisonment: *Regina v. Conlin* (1897), 29 Ont. R. 28; the deputy police magistrate had no jurisdiction at all in a case of this kind. The commitment and conviction are bad on account of the absence of the word "unlawfully." The warrant is bad because it does not state whose property the money was; and it is void for uncertainty because the money was not described: *R. v. Barnes* (1866), L.R. 1 C.C.R. 45.

*J. R. Cartwright*, Q.C., and *J. W. Curry*, Q.C., for the Crown: A magistrate has jurisdiction to impose a sentence longer than six months: *R. v. Archibald* [ante p. 159],

decided December 8, 1898, by Rose and MacMahon, JJ. Deputy police magistrates have the same power: *Re Parker* (1890), 19 Ont. R. 612. The conviction may now be amended if the sentence is longer than is authorized: *R. v. Gibson* (1898), 2 Can. Cr. Cas. 302, 29 Ont. R. 660.

*DuVernet*, in reply, referred to *R. v. Rose* (1896), 27 Ont. R. 195, as to the penalty.

TORONTO, October 31, 1900.

FERGUSON, J.—

In the view that I have taken of the case, I do not see that it is needful that I should consider or determine the question so elaborately argued regarding the status of the deputy police magistrate in reference to certain provisions of the Criminal Code.

The defendant was prosecuted for unlawfully stealing five dollars in money, the property of one Jennie McCoy, contrary to the form of the statute, etc., etc. I am of the opinion that the prosecution fell clearly under the provisions of section 783, paragraph (a), the value of the property alleged to have been stolen being less than \$10, it not being charged that the offence was "stealing from the person." In such a case the provisions of s. 787, I think, apply; and these seem to be that the magistrate (the word "magistrate" includes a police magistrate), after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for a term not exceeding six months.

The present conviction imposes a penalty of imprisonment in the Central Prison for the Province, there to be

kept at hard labour for the term of one year and three hundred and sixty-four days.

The provisions respecting amendment in cases of summary convictions do not, as I think, apply to this case, which is a case of summary trial.

The provisions of s. 800 as to amendments, etc., cannot, as I think, apply, because the same infirmity is found in the conviction and the commitment.

I think that both the conviction and the commitment are bad for imposing and professedly authorizing a penalty not warranted: see *Wood v. Fenwick* (1842), 10 M. & W. 195, referred to in the last edition of Paley on Convictions, p. 219. It is stated in the earlier editions of Paley that after the return to the habeas corpus is put in and read, as it was in this case, it is considered as filed; yet the Court may still amend the return, though the conviction cannot be amended. In the circumstances of the case I think I am not called upon to act, and I think I should not act, under the provisions of s. 752 of the Code.

The conviction and commitment being, as I think, bad, should be set aside. The defendant is, therefore, imprisoned without proper authority and contrary to law, and should be discharged from custody.

A condition, however, is that no action is to be brought by him or on his behalf in respect of such imprisonment.

*Conviction set aside.*

**Note:** *Summary trial of theft and kindred offences—Cr. Code 782, 783, 785, 787.*

In *R. v. Conlin* (1897), 1 Can. Cr. Cas. 41, it was held by Boyd, C., Ferguson, J., and Robertson, J., of the Ontario High Court of Justice, that a prisoner summarily tried, with his own consent, by a police magistrate in Ontario, on a charge of theft from the person, where the value of the property stolen was under \$10, was properly sentenced to three years' imprisonment. Mr. Justice Ferguson there

*Note—Continued.*

held that stealing *from the person* constituted what was formerly known as "aggravated larceny," and that the omission to include in Code section 783 "stealing from the person" as well as "theft," left the former offence punishable only under section 344. That section is taken from the Larceny Act, R.S.C. c. 164, sec. 32, which was taken from 32-33 Vict., c. 21, sec. 39. Mr. Justice Roberson also held that theft from the person was not within section 783. Boyd, C., however, favoured the argument that the word "theft" in section 783 is of generic import, and would include a case of "stealing from the person," but that a *police* magistrate trying an accused person, with his own consent, under the special powers conferred by section 785 was not limited by section 787 as to the punishment he might impose. The latter view has been embodied in the recent amendment of the Code.

By the Criminal Code Amendment Act of 1900 (in force from January 1, 1901) it is declared that sections 787 and 788 do not extend to or apply to cases tried under section 785, which specially authorizes a *police or stipendiary* magistrate in Ontario to try, with the prisoner's consent, any offence triable at General Sessions, and to impose the same punishment to which he would be there subject (63 Vict., Can., c. 46.) By the same Act these special powers exercisable by police and stipendiary magistrates in Ontario were extended to "police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions."

It would, therefore, appear that if the accused be charged with

- (1) Theft, under §10;
- (2) Receiving stolen property, under §10;
- (3) Obtaining money or property, under §10, by false pretences; or
- (4) Attempt to commit theft (any amount);

he may, on "summary trial" in Ontario, before

- (a) a County Court judge (being a J.P.);
- (b) a Judge of Sessions; or
- (c) a District Magistrate;

exercising the powers of a "magistrate," under sections 782 and 783, be punished only under the provisions of section 787, and the sentence will be limited to six months' imprisonment (with or without hard labour).

But if the accused comes before

- (d) a Police Magistrate; or
- (e) a Stipendiary Magistrate;

**Note—Continued.**

section 787 no longer applies, and he may, on summary trial in Ontario, be sentenced to the same punishment as might be imposed on a trial before the General Sessions on indictment, viz:

- (1) In the special cases referred to in sections 319-355 inclusive, the punishment therein specified.
  - (2) Theft (not over \$200) in cases not otherwise provided for, and where there is no charge of a previous conviction for theft—7 years.
  - (3) Theft as above, where offender has been previously convicted *of theft*—10 years.
  - (4) Theft (over \$200), the above punishments and two years additional. (Cr. Code, sec. 357.)
  - (5) Receiving—14 years. (Cr. Code, sec. 314.)
  - (6) Obtaining money or property by false pretences—3 years. (Cr. Code, sec. 359.)
  - (7) Attempt to commit theft—one-half of the term to which a person who actually committed the theft would be liable to be sentenced. (Cr. Code, sec. 529.)
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## [COURT OF SPECIAL SESSIONS, MONTREAL]

BEFORE HIS HONOR JUDGE CHOQUET.

**THE QUEEN v. DOWD.**

*Gaming—Margin contracts in stocks and merchandise—Broker—Accessory—Mens rea—Cr. Code, sec. 201.*

1. A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under section 201, paragraphs (a) and (b), of the Criminal Code of Canada, nor as accessory under section 61.

MONTREAL, March 30, 1899.

CHOQUET, J.—

The accused is charged with having on the 9th of September last, at the city of Montreal, acted, aided and

abetted with a person at present unknown, with the intent to make gain or profit by the rise and fall in the price of stocks, goods, wares or merchandise, made or signed, or authorized to be made or signed, a contract or agreement, oral or written, purporting to be for the sale or purchase of one thousand bushels of wheat in respect of which no delivery was made or received, and without the bonâ fide intention to make or receive such delivery; and that for three weeks preceding the 15th September last, at the said city of Montreal, the said Louis Dowd did act, aid and abet with persons at present unknown, with the intent to make gain or profit by the rise and fall in the price of stocks, wares, goods or merchandise, make, sign or authorize to be made or signed contracts or agreements oral or written purporting to be for the sale or purchase of shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased was made or received, and without the bonâ fide intention to make or receive such delivery.

The preliminary hearing took place before Mr. Lafontaine, J.P., and the accused was committed to stand his trial before the Court of Queen's Bench on the above charge. The accused having made option to have his trial under the Speedy Trials Act, I have to decide if he is guilty or not.

The offence mentioned in section 201, paragraphs (a) and (b) of the Criminal Code, requires three essential elements; (1) having an intent to make gain or profit; (2) making or signing contracts purporting to be for the sale or purchase of certain commodities; (3) absence of a bonâ fide intention to make or receive delivery of such commodities. These three elements must co-exist in order to constitute an offence under the provisions of that section.



The evidence adduced before me shews that the contract in question was entered into by the accused acting as a broker for two parties, a buyer and seller. He was correspondent for an American firm, the Municipal Telegraph and Stock Company of Albany, and he placed orders received by him here with them, and it was immaterial to him whether this company who accepted his orders were actually contracting parties as principals or merely brokers like himself, but having special facilities for dealing in Chicago and New York. The accused had no interest beyond his commission, which remained the same no matter what fluctuations occurred in the market value of the commodities being dealt in. His customer here paid him a cash deposit to guarantee him against loss, and to pay his commission in advance. He was not interested in the event in any way.

The main element of the offence, that is to say the intention to make gain or profit by the rise or fall in price, is not proven. On the contrary, it is shewn conclusively, in my opinion, that no gain was contemplated by him as the result of any prospective fluctuation in price. The only interest of the accused is shewn to have been his commission based on the par value of the commodity dealt in, a fixed and determined sum.

It has been contended on the part of the prosecution that the accused is in any event liable as an accessory, under article 61 of the Criminal Code. There is nothing in the record to shew that the Municipal Telegraph and Stock Company were acting as principals, or were in any way interested in the result of the speculation entered into by the informant, and even supposing such proof existed, Mr. Dowd is not shewn to have had any guilty knowledge of such intention on the part of either of the contracting parties by whom he was employed. The

mens rea is lacking; nor does there appear to have been such an identity of interest between him and the Municipal Telegraph and Stock Company as to lead to a presumption of such guilty knowledge as to render him liable for aiding and abetting. The accused is accordingly acquitted.

*Judgment of acquittal.*

*McGoun and England*, for the complainant.

*Reille and Bond, and J. L. Perron*, for the accused.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, C.J.Q.B. AND STREET, J.

**Re A. E. CROSS.**

*Elections—Prosecution for corrupt practices—Joining several charges in one proceeding—Evidence heard on each before adjudication on any charge—Prescription—Ontario Elections Act, 188, 195—Cr. Code sec. 626.*

1. On a proceeding by summons in the nature of a criminal prosecution under the Ontario Elections Act, sec. 188, all corrupt practices charged as having been committed by the accused in respect of the same election may be tried together and included in the one judgment of conviction.
2. Such a prosecution is not an "action" for a penalty and is therefore not prescribed in one year under the Ontario Elections Act, sec. 195 (3) or in two years under the Ontario Limitation of Actions Act, R.S.O. c. 72, s. 1.

ARGUED: September 19, 1900.

DECIDED: November 12, 1900.

THIS was a motion by way of appeal from an order of ROSE, J., refusing a certiorari for the removal of the proceedings in this matter.

The applicant, A. E. Cross, was convicted on April 24th, 1900, of three several corrupt practices before OSLER and MACLENNAN, J.J.A., sitting under secs. 187 and 188 of R.S.O. ch. 9, as a Court for the trial of corrupt practices committed at the Halton Provincial election held under "The Ontario Election Act" on February 22nd, 1898, and March 1st, 1898. A penalty of \$200 was imposed for each offence, making \$600 in all, which sum, with costs, he was ordered to pay within one month, and it was ordered that in default of payment he should be imprisoned for six months unless the penalties and costs should be sooner paid.

A motion made in Chambers before ROSE, J., for a certiorari to remove the proceedings into the High Court was refused.

The present motion was made by way of appeal from such refusal and also as a substantive motion before the Divisional Court.

TORONTO, September 19, 1900.

*Lynch-Staunton*, Q.C., for the motion referred to *Lennox Election Case* (1885), 1 Elec. Cas. 442, at p. 426; *Muskoka Election Case* (1876), H.E.C. 458, at p. 480; *Hamilton v. Walker* (1892), 56 J.P. 583; *Regina v. McBerney* (1897), 3 Can. Crim. Cases 339; *Regina v. Fry* (1898), 19 Cox 135; *Woods on Mandamus*, p. 194; R.S.O. ch. 9, secs. 187, 195, sub-sec. 3.

*Dymond*, for the Attorney-General, referred to Comyn's Dig., vol. 2, p. 340; Encl. of Law of Eng., vol. 2, p. 421, Tit. "Certiorari;" *Re McQuillan v. The Guelph Junction R.W. Co.* (1887), 12 P.R. 294; R.S.O. ch. 9, sec. 188, sub-sec. 4.

TORONTO, November 12, 1900.

FALCONBRIDGE, C.J.—

At the argument we intimated to counsel that in our opinion this proceeding was not an "action" within the meaning of the Ontario Election Act, sec. 195, sub-sec. (3), or of R.S.O. ch. 72, sec. 1, sub-sec. (g), and there is nothing in this objection.

Nor does the second ground of objection (as to the reservation of judgment) seem to be better founded.

In *Reg. v. Fry*, 19 Cox 135, the Justices stated that, in adjudicating on each case they applied to that case the evidence that was given in reference to it and no other. It was held that the postponement by the Justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.

We may safely assume that the learned Judges in the present matter decided each charge on its own merits.

I have not considered, and I do not pass upon the question, whether certiorari lies to remove this conviction.

STREET, J.—

The grounds upon which the application for certiorari was rested were two:—

1st. That the proceedings having been commenced after the expiration of one year from the time the corrupt practices were committed, were barred by sub-sec. 3 of sec. 195 of R.S.O. ch. 9.

2nd. That the Judges who constituted the Court reserved their judgment after hearing the evidence upon one of the charges until they had heard the evidence in the others.

The first of these objections to the conviction is clearly not supported by the statute referred to. By sec. 195 of R.S.O. ch. 9, an action is given to any one who sues for any penalty imposed by the Act; in such an action the plaintiff is entitled to allege that the defendant is indebted to him in the amount of the penalty, and the action is to be tried by a Judge without a jury. It is this action which is to be commenced within a year after the act committed, and not the prosecution authorized by secs. 187 et seq. which is not an action, and is not begun by a writ but by a summons, and is in the nature of a criminal proceeding.

The second objection appears to me to be also unsustainable. It is provided by sec. 188, sub-sec. (1) that several charges of corrupt practices may be stated in the summons requiring the defendant to appear, and by sub-sec. (7) the Court may adjudge after hearing the evidence that he has been guilty of the corrupt practice or corrupt practices, and may order him to pay the penalty or penalties assigned by the statute to the offence or offences of which he has been convicted; then by sub-sec. (11), where a penalty or penalties is or are imposed, they shall direct that unless the amount be paid within a time not exceeding one month, the person convicted shall be imprisoned for a period not exceeding one year.

The statute, therefore, expressly contemplates and permits any number of corrupt practices to be charged in the same summons and to be tried together, and requires one term of imprisonment to be imposed in default of payment of the total amount of the penalties for all the corrupt practices included in the summons of which the person charged has been convicted.

It was argued that it was contrary to established principles to try the applicant upon the subsequent

charges without first disposing of that upon which the evidence had been taken ; but we find a special provision in sec. 626 of the Criminal Code, 1892, for the trial at the same time and upon the same indictment of three distinct charges of theft alleged to have been committed within six months of one another by a prisoner. Upon the trial of such an indictment, it is manifest that the jury must be placed in possession of the evidence upon all the charges before being required to find the verdict upon any of them. The danger that a jury might not separate and properly apply the evidence upon the different charges in dealing with them is surely much greater than that a Judge might not do so. There are other instances to be found in the Criminal Code of the same character, and there is plainly no violation of any principle in giving to the provisions of sec. 188 of R.S.O. ch. 9 the meaning which seems plain upon their face, viz., that any number of corrupt practices charged as having been committed by the defendant at the same election are intended to be tried together and to be included in the same judgment.

I think, therefore, that the course taken by the Court which tried the defendant, in refusing to pronounce separate judgments upon each charge until the evidence upon all the charges was complete on both sides, was entirely correct.

I have examined the cases referred to by counsel for the present motion, viz. : *The Queen v. McBerney*, 3 Can. Crim. Cases 339 ; *Hamilton v. Walker*, [1892] 2 Q.B. 25 ; *Reg. v. Hazen* (1893), 23 Ont. R. 387 ; s.c. in appeal, 20 Ont. App. 633, but I find nothing in them which requires me to change the view I have expressed ; see also *Reg. v. Fry*, 19 Cox 135.

The motion and appeal must therefore be dismissed with costs.

*Certiorari refused.*

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE OUIMET, J., IN CHAMBERS.

## THE QUEEN v. JOHNSON.

*Ticket of leave—Act respecting—Conditional liberation of convicts (Can. 1899, c. 49)—Revocation of license—Expiry of term of imprisonment—Computation of time from passing sentence—Ticket of leave revoked without fresh conviction—Term of imprisonment not extended—Cr. Code, s. 955 (7).*

1. The term of imprisonment in pursuance of any sentence runs from the day of the passing of such sentence, without interruption, except when especially provided otherwise by law.
2. The license issued under the authority of 62-3 Vict., c. 49, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned.
3. The revocation by the Crown, without cause assigned, of such license works no interruption in the running of the sentence which shall terminate at the same time as if such license had never been granted.

MONTREAL, January 22, 1901.

OUIMET, J.—

THE petitioner alleges in his petition for a writ of habeas corpus that he is now detained in the penitentiary in virtue of a five years' sentence passed upon him by this Court, on the third day of January, 1896; that on the eighth day of March, 1900, he was liberated by virtue of a license issued by the Crown, under the authority of the Act to provide for the conditional liberation of convicts, while undergoing sentence: 62-63 Vict., c. 49, s. 1; that on the ninth day of July following, the Crown in the exercise of its discretionary power under section 1 of the same Act, and without assigning any cause or reason for doing so, did revoke said license, and the petitioner was in

consequence re-committed to the penitentiary by a judge of the Sessions, "there to undergo the residue of his original sentence as if such license had not been granted:" s. 3 of the Act.

He claims that his sentence of five years, reckoned from the 3rd January, 1896, has expired on the 3rd January, inst., and that he is now entitled to be released. In other words, the petitioner's contention is that the period of time during which he was conditionally allowed out of the penitentiary should be counted as part of his sentence.

Article 955 (7) of the Criminal Code provides that "the term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of the passing of such sentence; but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

The exception proves the extent of the rule. The present case is not within this exception, and unless it is especially provided for by the statute under which it has originated, the general rule must be followed.

In the exercise of a discretionary power given to the Crown, a convict may be allowed under c. 49 of the 62-3 Vict. to live outside of the walls of the penitentiary. But his liberation is only partial, subject to all the conditions contained in his license.

Some of these conditions are to the effect that he cannot leave Canada; he may even be restricted to certain parts of Canada, etc., etc. He may be called upon at any time to produce his license, etc. To the last day of his sentence he is held by the law, and in fact is still a convict, completing the term of his condemnation out of jail under what has been very appropriately called a ticket



of leave, which only holds good during good behaviour and during the good pleasure of the Crown. If this license is revoked on account of bad behaviour, and after conviction for the same, he is recommitted to the penitentiary, and the penalty is that "he shall *further* undergo a term of imprisonment equal to the portion of the term to which he was sentenced that remained unexpired at the time his license was granted : " s. 11.

This provision is very clear. The commission of any indictable offence as well as the violation of the various conditions of his license will, *after conviction for the same* before a competent magistrate, authorize the Crown to revoke his license and order his recommitment to the penitentiary as above.

No such penalty is imposed by the Act in case the license is revoked by the Crown without any cause being assigned. The license under which he was allowed to be at large is simply cancelled, and the result is that he may then be recommitted to complete his sentence in jail as if no license had ever been granted to him.

In the one case, the law provides that as a penalty he has to put in again the time he was out of prison under license ; in the other case no such penalty is provided by law. He is in the same position as if he had been taken out by process of law, removed, for example, to testify before a tribunal.

*En résumé*, I am of opinion that the revocation of the license by the Crown without assigning cause, under s. 1 of the Act, leaves matters just as they are at the date of such revocation with no other effect than that the convict, instead of being left at large to purge his sentence under the conditions of his ticket of leave, is brought back to the penitentiary for the same purpose. Through the good pleasure of the Crown he loses the restricted liberty that

he owed to the same. But he has incurred no new penalty, such as the law enacts against those convicts who have been convicted of a new criminal offence or of any violation of the conditions of their license.

Finding in the language of clauses 1 and 3 which apply to the present case, no penalty attached to or resulting from the mere cancellation of the petitioner's license, I am of opinion that he cannot be subjected to any extension of the time of his sentence, an opinion which is shared by all my colleagues whom I have had an opportunity to consult. The petitioner's sentence by mere effluxion of time expired on the 3rd January inst., and he is from that date entitled to his unconditional liberation. The prayer of the petitioner is granted.

*Order for discharge.*

*James Crankshaw*, for petitioner.

*J. P. Cooke*, Q.C., for Attorney-General.

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## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE THE FULL COURT.

**Re GREENE.**

*Sunday observance—Selling cigars on Sunday—Local or police regulation—Constitutionality of Lord's Day Act (N.B.), 1899—When quasi-criminal legislation of Province intra vires.*

1. The selling of cigars on Sunday may be prohibited either directly by a provincial legislature or by municipal by-laws authorized by such legislature; and in either case such restriction is of a merely local nature, and is to be classed as a police or municipal regulation and not as a matter essentially appertaining to the "criminal law," and so within the sole competence of the Parliament of Canada.
2. The New Brunswick statute to prevent the profanation of the Lord's Day, 62 Vict. c. 11, is intra vires of the provincial legislature.

DECIDED: April 20, 1900.

Rule nisi for a certiorari to remove a conviction for profanation of the Lord's Day by selling cigars on a Sunday.

*Pugsley, Q.C., and A. W. Macrae, in support of rule.*  
*A. S. White, Q.C., and Stockton, Q.C., contra.*

FREDERICTON, N.B., April 20, 1900.

The judgment of the court was delivered by

TUCK, C.J.—

The appellant Greene was convicted before the police magistrate of Saint John for selling cigars on a Sunday and fined \$20. The conviction was made under the provisions of s. 1 of 62 Vict., c. 11, passed in April, 1899, by the provincial legislature, and the sole question involved in this application is whether that Act, or at all events that section of it, is ultra vires of the local legisla-

ture. The Act in question is entitled "An Act to Prevent the Profanation of the Lord's Day." Another section under which Greene was convicted is as follows:—

"No person shall on the Lord's Day, commonly called Sunday, sell, or publicly shew forth, or expose, or offer for sale, or shall purchase any goods, chattels, or other personal property or any real estate whatsoever or do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers, or Her Majesty's mails by land or water, selling drugs or medicines, and other works of necessity and charity excepted)."

The Act contains several other provisions to which it is unnecessary now to refer. The scope and object of the Act are (1) to prohibit personal or real estate from being sold or publicly offered or exposed for sale on Sunday; (2) to prohibit such worldly labour, business or work from being done on Sunday as is not specially excepted from the operation of the Act; and (3) to prohibit certain kinds of amusement or recreation on Sundays.

The main ground upon which the validity of this conviction is questioned is that, not only the section in question, but the whole Act is *ultra vires*, because it relates and deals with the criminal law in the sense in which that term is used in s. 91, No. 27 of the British North America Act, and which gives the exclusive right of legislation in reference to it to the federal parliament. For many years prior to confederation and up to the enactment of the statutes relating to the criminal law by the Dominion Parliament, there was, as a part of the so-called criminal law in force in this Province, c. 144 of the Revised Statutes, intituled "Offences Against Religion," consisting of two sections. The first provided for a penalty of 40s. for the disturbance of any meeting of persons assembled for religious worship or of any persons

officiating at such meeting; and the second provided for a similar penalty of five days' imprisonment for openly desecrating the Lord's Day by shooting, gaming, sporting, playing, hunting, drinking or frequenting tippling houses, or by servile labour, works of necessity or mercy excepted. The first of these sections has been superseded by Dominion legislation (R.S.C. c. 156; Cr. Code, ss. 171, 172, and 173), and by the law as it now stands, the unlawful obstruction of a clergyman in celebrating divine service, and violence to him while officiating in such service, are indictable offences and punishable by two years' imprisonment, while the disturbance of public worship is an offence punishable on summary conviction by a penalty not exceeding \$50 (fifty dollars).

Section 2 of c. 144 of the R.S. of N.B. has never been repealed, neither is there any legislation by the Dominion in the matter covered by that section, nor, as I believe, by the wider area covered by the Act under which the present conviction took place. The Act, as originally passed in this Province in 1786 (26 Geo. III., c. 5), is entitled "An Act against the profanation of the Lord's Day, commonly called Sunday, and for the suppression of immorality." Some changes were made in it in 1831 by 1 Wm. IV., c. 38, and by the Act 12 Vict., c. 29, passed in 1849, which consolidated the criminal law of that day. These two sections were included, one under the heading "of disturbing religious assemblies," and the other under the heading "of profaning the Lord's Day." Chapter 144 of the Revised Statutes of N.B. (1854) is simply a re-enactment of these two sections in a somewhat abbreviated form, and so they stood at the time of confederation.

The principal argument addressed to us against the constitutionality of the provisions under which the conviction was made is based on the fact that Sunday profanation

was at the time of confederation recognized as a criminal matter, and dealt with as a part of the criminal law of this Province, and made punishable under c. 144 R.S. And it was said to be a legitimate result from that, that Sunday profanation is included as a part of the "Criminal Law" within the meaning of that term as it is used in s. 91, No. 27, of the B.N.A. Act, and therefore one of the subjects with which a provincial legislature cannot deal. And Mr. Pugsley sought to deduce a similar conclusion from the fact that the Dominion Parliament had, by virtue of its right to legislate as to the criminal law, in fact legislated in the way I have already mentioned as to interference with public worship and with clergymen in the discharge of their official duties as offences against religion, and thereby occupied a part of the ground covered by c. 144 R.S.; and he claimed that it must be taken as conclusive of the right of the federal parliament to occupy the remainder of the field, to the exclusion of the provincial authority—not that provincial legislation on the subject was good until it should be superseded by that of the Dominion, but that the provincial legislation would be invalid as relating to a subject altogether outside of the area covered by the local authority. I am unable to agree with either of these views. It would, I think, be very unsafe to conclude that because for the sake of convenience or ready reference, or any other reason, the revisors of our statutes in 1854 had gathered into one group the existing Acts relating to offences and called it the Criminal Law, it therefore followed that the Dominion Legislature had the exclusive right of legislation as to all matters therein dealt with. If this argument could prevail, it would confer upon the federal parliament the exclusive right of legislating upon the subject of drunkenness as a part of the criminal law, because c. 145 of the

Criminal Law of New Brunswick, as it stood at the time of confederation, made drunkenness an offence punishable with about the same severity as Sunday profanation was. In addition to this, to the extent that the criminal laws of the various Provinces differed—and it is well known that they did differ—the argument would not apply uniformly to each Province. Obviously there is a large class of cases in reference to which the provincial legislators have ample power to legislate, and which do not become a part of the criminal law simply because a breach of the law is punishable by fine, penalty or imprisonment. And the question here is whether the present case comes within that class. I do not think that any weight should be attached to the other branch of Mr. Pugsley's argument on this point. If I were driven to draw any inference from the fact that all legislation as to Sunday profanation had been omitted from the Criminal Code, I should think it a much more reasonable inference that in legislating the whole Criminal Law of Canada into a code, Parliament had dealt with all criminal matters in regard to which it had an exclusive right of legislation. Historically it is known (Burbidge's C. Law, No. 160, note) that the omission was by design. There are wide differences in character between the offence of disturbing religious assemblies for worship or interfering with clergymen in the discharge of their official duties and the offence of buying a cigar or going to a picnic on a Sunday. Every person has an undoubted right to engage in the public worship of God according to his own particular method, without being disturbed or hindered. That is a right common to all and in all places. But what may be done on a Sunday without profaning it is a matter of opinion and largely of sentiment—dependent upon a variety of circumstances and conditions—and one upon which well-disposed people hold widely different views.

And I am disposed to think that the Dominion Parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public or affect them all to the same extent or apply to them all in the same degree, but was rather to be regarded and dealt with as a police regulation, local in its character and in its application, and which required to be moulded so as to suit the requirements and meet the conditions of different localities and different classes of population, and in that way secure a reasonable cessation from labour and worldly business on Sunday and confine its recreations within reasonable limits. Such, at all events in my opinion, is the nature of legislation such as this, and I think the provision under which this conviction took place was enacted by a competent legislative authority.

In the first place, as the provincial legislature has passed the Act, presumably the power has been constitutionally exercised. It was said that selling cigars on a Sunday was an indictable offence at common law. This proposition does not seem to be supported by authority. In *Smith v. Sparrow*, 4 Bing. 84, Park, J., says:—"The common law, indeed, is founded on our holy religion, and no law can be good which is not. But at common law the observance of the Sabbath is a duty of imperfect obligation, as we find by *Rex v. Brotherton*, 1 Strange 702, where it was held that selling meat on a Sunday was no offence at common law." In the *Atty. Gen. v. Radcliffe*, 10 Ex. 96, Martin, B., says:—"There are many crimes properly so called which are liable to be punished on summary conviction. But there are a vast number of acts which in no sense are crimes which are also so punishable, such for instance as keeping open public-houses after certain hours, and a variety of breaches of police regula-



tions which will readily occur to the mind of any one." (See also *Rex v. Boardman*, 30 U.C.Q.B. 553.)

Acts like this one in question, intended to prevent what is ordinarily spoken of as Sunday profanation, have always been regarded as police or municipal regulations designed to promote morality and good health by the rest from labour and business which they enforced. And all writers give prominence to the value of Sunday as a mere civil institution for the reason that it is a day of rest. Blackstone speaks of the admirable service to the State it is to keep one day in seven as a time of relaxation and refreshment, as well as for public worship, and says that it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness.

In *King v. Crowley*, 113 U.S. 703, Mr. Justice Field says:—"Laws setting aside Sunday as a day of rest are upheld, not from any right of the Government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labour." And in *Stone v. State of Mississippi*, 101 U.S. 814, Chief Justice Wait says:—"Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals."

In this Province at the date of confederation, municipalities were authorized to make by-laws, among other things, "to prevent the profanation of the Sabbath:" 1 R.S. c. 45, as amended by 18 Vict., 22, Acts of 1855, p. 93. And by c. 99 of the Con. Stat. at present in force, the

different municipalities in the Province, which include the whole Province, have power to make by-laws "for preventing vice, immorality, and indecency in the streets, highways and other public places, and for preventing the profanation of the Sabbath." It is clear, therefore, whether it adds weight to the argument or not, that the legislature of this Province, both before confederation and since, has repeatedly recognized Sunday profanation as a matter to be dealt with and controlled by the several municipalities—each in the way which seemed most suitable to its conditions and requirements—and that by-laws made for the purpose were regarded in no other light than mere police or municipal regulations.

It is true that the Act in question relates alike to the whole Province, but it is not to my mind less local in its character than by-laws embodying similar provisions would be when enacted by the several municipalities in the Province, and in that way including the whole Province. This, however, is not a case of a by-law, and is therefore free from many of the questions involved in the case of the *City of Toronto v. Virgo*, [1896] Appeal Cases, 88; 22 Can. S.C.R. 447.

In that case the by-law in question prohibited hawkers from carrying on their trade in certain streets in the city of Toronto. It was enacted in pursuance of a provision of the Municipal Act of Ontario (c. 184 R.S. of O., 1887), which authorized the city council to pass by-laws "for licensing, regulating and governing hawkers," etc. And it was finally determined that upon a fair construction of the statute such a power did not authorize a by-law prohibitive in its character such as the one in question. The argument was used in all the courts that the by-law was *ultra vires*, as being in restraint of trade and an interference with trade and commerce. The

general power to regulate the trade was not disputed, and various other sections in the statute expressly authorizing prohibitive by-laws were not claimed to be outside of the legislative authority of the Province. Lord Davey says: "No doubt the regulation and governance of a trade may involve the imposition of restrictions in its exercise both as to time and to a certain extent as to place when such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order." And in *Slattery v. Naylor*, 13 App. 446, Lord Hobhouse says: "It is difficult to see how the council can make efficient by-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butcher's meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property."

In *Hodge v. The Queen*, 9 App. Cas. 117, where the validity of a local regulation prohibiting the playing of billiards in taverns on Sunday, made under a provincial License Act, which, like the one now in force in this Province, prohibited the sale of liquors on Sunday, Sir Barnes Peacock says: "These seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquor by retail, and such as are calculated to preserve in

the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion Parliament." Speaking of this case, the present Chief Justice of Canada, in *Huson v. The Township of South Norwich*, 24 Can. S.C.R. at page 147, says: "That these words, 'municipal institutions,' do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of *Hodge v. The Queen*." Hence the various license Acts in force in this and other Provinces and passed by the provincial legislatures contain special provisions prohibiting the sale of liquor on Sundays and some other special days, because such suppression is deemed expedient or necessary for the preservation of good order and government.

Appellant would contend that if Parliament has not enacted such a law, the provincial legislature cannot authorize the municipalities to prohibit the sale of such articles within their limits. Such a contention cannot prevail. There is a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which may yet be legislated upon by the federal Parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion, but until it does so the Provinces have, each for itself, the same power.

I am unable to distinguish this case in principle from those I have cited. Many of them relate to the sale of spirituous liquors, but that fact has no special significance. Spirituous liquor is not one of the class of subjects

enumerated in s. 91 of the B.N.A. Act, in reference to which the Dominion Parliament has alone the right to legislate. It stands, so far as that is concerned, on the same footing as any other trade or business. If, by an Act of the provincial legislature, either operating directly or through the medium of a municipality, the sale of liquor, or the playing of billiards in public, can be prohibited on Sundays as a police regulation, why may not the sale of cigars or the playing of other games be prohibited on the same ground? The evil caused by the one may be greater than that caused by the other—the one may lead to more disorderly conduct than the other—that is merely a question of degree. The object of the legislation in both cases is the same, the reason for it is the same, and in my opinion the power to enact it is the same.

I desire to confine what I have said to the particular case before us. There may be other features of the Act (I do not mean to suggest that there are) to which some of my remarks might not apply. These are not involved here and have not been discussed.

I think the conviction should be sustained.

*Conviction affirmed.*

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## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, RITCHIE, AND TOWNSHEND, JJ.,  
GRAHAM, E.J., AND MEAGHER, J.

## THE QUEEN v. MacCAFFERY.

*Theft of money—Picking lock—Money not identified—Possession by accused  
of money not accounted for—Onus of proof—Presumption of law—  
Error—New trial—Cr. Code secs. 743, 746, 747.*

1. If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, it is shewn that the accused, one of the ship's seamen, had access in common with the other seamen to the place where the box was kept, that shortly before the theft was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shewn to be untrue, such constitutes legal evidence to support a conviction.
2. If, however, the trial judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial.

ARGUED: February 8, 1900.

DECIDED: March 13, 1900.

The prisoner, a chief boatswain's mate on the cable steamer "Minia," was tried before J. W. Johnstone, Esq., County Court Judge for District No. 1 in Nova Scotia, on the 23rd January, under Part LIV of The Criminal Code, 1892, for that he, the said "Percy E. MacCaffery did, in the City of Halifax, on or about the 25th day of December, 1899, unlawfully steal, by means of a pick-lock, false key or other instrument, the sum of \$26.00 of the goods and chattels of John Peterson, from a receptacle for property, locked and secured, said receptacle being on board the

British steamer "Minia," which was lying at Corbetts' wharf in the City of Halifax."

The evidence adduced at the trial disclosed that, on December 23rd ult., the prisoner, in common with the other ship's hands, was paid his wages, amounting to \$7.96, being a balance then due him. On the afternoon or the evening of the same day he obtained from the purser an advance of \$7.00 more, alleging he had spent all his previous pay.

On Christmas day, at noon, the prosecutor, Peterson, placed \$26.00 in his wallet and placed the wallet so containing the money in his chest, and locked the chest. He never missed the money till 7 p.m. of the next day, the 26th, which was the first occasion after the time he deposited it that he went to look for it, and then he found his chest had been broken open and the money gone, though the wallet containing it was left behind in the chest where he placed it. The chest then, and always, stood in a place under decks in the forepart of the ship called the "square," where the prisoner, the prosecutor and twelve other men lived, slept and had their belongings, including several chests. Shortly after placing the money in his chest, Peterson went on shore, but returned again during the afternoon to the ship, where he met the prisoner in the "square" about 4 p.m., who asked him for the loan of \$5.00, with which Peterson promised to accomodate him on his return from deck, where he was going to discharge some duty. Peterson returned to the "square" in about 10 minutes, and it was then occupied by MacCaffery, who was asleep on a chest. No transaction of a monetary character ever afterwards took place between them. At this time two other occupants of the "square" were on duty on deck, who, it was admitted, had access to the "square." The other occupants of the "square,"

it seems, went ashore in the early part of that afternoon, but they had opportunity for returning to the ship at all times. It was proved that about 2.30 p.m. on Christmas Day—the same day—the prisoner mentioned his shortness of money to the second engineer, who swore on the trial he lent him none, though MacCaffery asserted that day, and afterwards, he did to the extent of \$5.00. A seaman by the name of Linberg, saw MacCaffery in the ship's hospital that same afternoon before dark with some paper money on him, including two \$5.00 bills. The same night the prisoner was ashore in a public house on Water Street, and was seen in possession of paper money in a roll of about an inch in diameter, and out of it he voluntarily lent \$5 and \$2, respectively, in paper money to two hands belonging to the ship, who were in company with him. When Peterson's money was missed, the prisoner assured the prosecutor "that he need not suspect him," as, he said, he borrowed money from the purser and the engineer.

The Crown did not attempt to identify the money seen on the prisoner with any stolen from or missed by the prosecutor, nor was it shewn that the prisoner knew Peterson had placed his money in the chest in the "square."

The prisoner called no witnesses and offered no evidence, but his counsel contended that the above facts were quite consistent with his client's innocence, and that they did not exclude every hypothesis, other than that of guilt, and that there was no legal evidence to support a conviction.

The learned judge thought the prisoner could have shewn how he came by the money seen on him, which would have settled the matter, but he did not do so. In view of the fact that he had a good deal of money on him, more than he had received as wages or borrowed, and had lent money to nearly the amount of his wages, and had



failed to shew where he obtained it, he thought that the sure presumption was that he had abstracted it from Peterson's chest, as he had the opportunity of doing, and that therefore it was his duty to convict him, which he did, and sentenced him to three months' imprisonment in the county gaol, which sentence he was now undergoing.

At the request, however, of his counsel he reserved for the opinion of the Court of Appeal, sitting as a court for Crown Cases Reserved, two points:

(a) Whether or not there was any legal evidence to support the conviction, the above facts being a recapitulation of the evidence produced by the Crown;

(b) Whether he was justified in drawing from the facts above stated a presumption sufficiently strong to justify the finding of a judgment of guilty?

Further, under and by virtue of s. 747 of the Criminal Code, he gave leave to the prisoner to apply to the Supreme Court of Nova Scotia, on the hearing of the case above reserved, for a new trial, on the ground that the said conviction was against the weight of evidence.

HALIFAX, February 8, 1900.

*J. J. Power*, for prisoner: The charge is laid under Crim. Code s. 346. [TOWNSHEND, J.—The County Court Judge cannot reserve questions of fact.] This is not a question as to the sufficiency of the evidence. The question reserved is whether there is any legal evidence to support the conviction. *R. v. Winslow*, 36 Can. Law Jour., page 33; 3 Can. Crim. Cases, 215. [RITCHIE, J.—There is certainly some evidence here, and the moment that is admitted the question becomes one as to the sufficiency of the evidence. GRAHAM, E.J.—It is always a question of law whether there is evidence to go to a

jury, and there must be something more than a scintilla of evidence.] *R. v. Smith*, 12 L.T.R. 613. The trial judge has merely found that the facts were consistent with guilt. *R. v. McIntyre*, 31 N.S.R. 824, 3 Can. Crim. Cases 413; Wills on Circumstantial Evidence, pages 188 and 189; *R. v. Hodge*, 2 Lewin 227; Lawson on Presumptive Evidence, page 531; *R. v. Doucey*, Old. 136. The fact that the prisoner did not testify is not to be permitted to weigh against him. Russell on Crimes, Vol. 3, pages 356 n. (e). Under Code s. 746, s.-s. (d), if the court consider the conviction wrong, they can reverse it.

*W. A. Henry*, contra: The giving of a false account of where money in his possession was obtained, is evidence against the prisoner. It is only necessary for the Crown to shew that there is some legal evidence in order to sustain the conviction. *R. v. Lloyd*, 19 Ont. R. 357; *R. v. Baby*, 12 U.C.Q.B. 353; *R. v. Wilson*, 26 L.J.M.C. 45; Russell on Crimes, Vol. 3, page 357; Roscoe's Criminal Evidence, page 18; Taylor on Evidence, Vol. 1 pages 183, 26 & 27; Best on Evidence, page 391; Greenleaf on Evidence, Vol. 1, pages 52 & 71. Only one question is before the court, namely, whether there is any legal evidence to support the conviction. [WEATHERBE, J.—Suppose the trial judge has gone on a wrong principle?] That would be the same case as if the judge had misdirected the jury on a question of law in a criminal case. This court could not set aside the conviction in such a case. It must be assumed in this case that the judge has decided the case upon the facts. The new trial can only be had under s. 747. That section is only applicable where there is conflicting evidence. [MEAGHER, J.—Surely under that section we must weigh the evidence.] The weight of evidence is in favour of the prosecution. The conviction must stand if there is any evidence to sustain it. The

second question reserved is not a question which it was in the power of the trial judge to reserve, because it is purely a question of fact.

*J. J. Power*, in reply: [WEATHERBE, J.—Suppose there was evidence for the jury, upon which a good conviction could be had, but the trial judge drew improper presumptions from the facts, what are we to do?] In that case the court would simply answer the questions. [RITCHIE, J.—What happens then?] The case would be sent back under s. 746 (e). *Wills on Circumstantial Evidence*, page 62.

HALIFAX, March 13, 1900.

WEATHERBE, J.—

There was a room used in common by the ship's crew of 12 persons, called the "square," where they lived and slept and to which they always had access night and day, in port or at sea.

Prosecutor and prisoner were of the crew.

While in port, at noon on Christmas day, prosecutor, while alone in the square, locked \$26.00 in his chest which, after dark the next day—over 30 hours after—he missed for the first time. There is no evidence of the character of the stolen money. During the whole of this period, the whole of the crew, and, so far as we know, others also, had access to this place night and day.

Prisoner had no knowledge that prosecutor had any money in the chest, nor indeed that prosecutor possessed a chest, or that there was any money in any chest in the square, or that money was ever kept there.

Prisoner returned on board at four o'clock of Christmas day, having gone ashore earlier, and requested a loan from prosecutor, which prosecutor consented to grant him. After an absence of 10 minutes from the square, prosecutor

returned to lend him the money, and found him asleep on the prosecutor's chest. Others on deck had access during this period to the square.

There is no evidence that prisoner was alone at any time in the square.

Before dark on Christmas day, 24 hours before the theft, prisoner was seen with two five dollar notes in the hospital of the ship, and the same night, in a public house, he lent \$5 and \$2 to two shipmates in his company.

There was evidence at the trial that on Christmas day prisoner had admitted he was short of money, and that, after the stolen money was missed, prisoner had said that he should not be suspected as he had borrowed money from the purser and engineer. He had formerly alleged that he had a loan from the engineer, which the engineer denied on the trial. The purser was not called, and prisoner gave no evidence.

The contention before the trial judge was that the alleged evidence was consistent with the prisoner's innocence, and did not exclude every hypothesis other than guilt, and there was no legal evidence.

In the decision the judge gave as his reason therefor, that the prisoner did not shew by others than himself how he came by the money seen in his possession.

It is not pretended there is any evidence against prisoner, except proof of an untrue statement of his, shewn to have been made as to a loan from the engineer, and the trial judge seems to put his judgment on the ground that it is, as a matter of law, to be presumed that if prisoner had come honestly by the money seen in his possession, it was possible for him to shew it, which is obviously erroneous.

I am of opinion that there is not even a scintilla of evidence to convict. The conviction rests on a mere cir-

cumstance of suspicion. Every one on the ship who could have been shewn to have been without money on the 25th, and in whose possession unidentified money was seen later on that day, for which he failed to account at the trial, could, on the principle enunciated, have been convicted. Prisoner seems to have been convicted for stealing unidentified money on the 25th, which was not proved to have been stolen till the evening of the 26th.

RITCHIE, J.—

In answer to the question as to whether or not there was any legal evidence to support the conviction, I am of opinion that there was.

I do not object to a new trial, if the rest of the court deem it advisable that there should be one, but I do not think the other question properly before the court, as to whether the learned judge was justified in drawing from the facts, as stated by him, a presumption sufficiently strong to justify him in finding a judgment of guilty.

TOWNSHEND, J.—

There is only one question properly before us, reserved by the County Court Judge, that is to say, whether or not there was any legal evidence to support the conviction. In my opinion there is legal evidence to support the conviction, but as to the weight of it, and the inferences to be drawn from it, that is a question for the jury—here for the judge, and can only come before us on a motion for a new trial. For this reason I do not think the judge can reserve for our consideration whether he was justified in drawing from the facts stated, a presumption sufficiently strong to find prisoner guilty. With his reasons for drawing such a conclusion, I think we have nothing to do as the matter comes before us.

GRAHAM, E.J.—

The learned Judge of the County Court says in his judgment: "I thought the prisoner could have shewn how he came by the money seen on him, which would have settled the matter, but he did not do so. In view of the fact that he had a good deal of money on him, more than he had recived as wages or borrowed, and had lent money to nearly the amount of his wages, and had failed to shew where he obtained it, I thought that the sure presumption was, that he had abstracted it from Peterson's chest, as he had the opportunity of doing, and that, therefore, it was my duty to convict him, which I did, and sentenced him to three months' imprisonment."

If the learned judge, in coming to his conclusion, allowed the element to enter into his consideration that there was a burden on the defendant to shew that he was innocent, he, in my opinion, was in error—his conclusion is not to be depended on—and there has been a mistrial. At the same time there is evidence which, I think, would justify a verdict of guilty. I refer to the prisoner's misstatement as to borrowing the money.

And, as this court has, under s. 746, power to order a new trial, and also to make such order as justice requires, I think a new trial should be granted.

MEAGHER, J. (dissenting)—

This case came before us on a case reserved under s. 743 of the Code, and under s. 747, which provides that after the conviction of a party for an indictable offence, the court before which the trial takes place may give leave to him to apply to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence.

I do not think that parliament intended that both of these remedies should be open to the accused at the same time. *R. v. McIntyre*, 31 N.S.R. 422, [*ante*, Vol. 3, page 413] covers this view. It is not, however, necessary to pronounce a considered opinion upon that subject in the present instance, because the learned counsel for the accused did not press his motion for a new trial, and, therefore, our enquiry is limited to the reserved case.

The charge was theft, committed by means of a pick-lock, false key or other instrument, whereby \$26.00 in money was taken from a receptacle for property, locked and secured, and being at the time on the steamer "Minia," lying at a wharf in the City of Halifax.

The learned trial judge said: "I thought the prisoner could have shewn how he came by the money seen on him, which would have settled the matter, but he did not do so."

This was not intended, I feel quite sure, to convey the idea that he might have done so by giving evidence himself; but that if he got money from other parties, he knew who they were and how much he received, and when, and, therefore, might have proved the facts by their testimony. Apparently the learned judge thought there was material for him to act on apart from this. We are not called upon to consider that aspect, however. No question has been reserved upon it, and we cannot, even if that view was erroneous, determine it. We must confine ourselves to the questions submitted.

I have gone over the evidence carefully several times, and considered it in the light of the arguments made by the prisoner's counsel, and feel myself obliged to conclude that there was sufficient material to enable the trial judge to make the findings and draw the inferences he did.

The question has not been submitted to us—at least that is my view—whether the judge drew any wrong

inferences, and I do not think we can deal with any aspect not presented by the reserved case.

*Order for new trial.*

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[COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE WHITE, J.

**Ex parte HANNING.**

*Indictment—Application to court for order to prefer—Preliminary enquiry before two justices—Disagreement—Expense of prosecution—Functions of Attorney-General—Cr. Code, secs. 595, 641.*

1. A superior court should not make an order under Crim. Code, sec. 641, that an indictment be preferred against a party accused of an offence if the two justices before whom the preliminary investigation was held signed a declaration to the effect that they were unable to agree.
2. In such a case the prosecutor should be left to his recourse to an application to the Attorney-General, who can either prefer an indictment himself or direct one to be preferred.
3. Whether or not the Crown should assume the expense incidental to a prosecution is more particularly a question for the Attorney-General as a part of his executive functions, and is not one to be decided by a court.

SHERBROOKE, QUE., October 30, 1896.

WHITE, J.—

On the 1st of October inst., petitioner presented a petition to this Court for an order under the last clause of the 2nd paragraph of art. 641, Criminal Code, to prefer an indictment before the Grand Jury against Antonio Tanguay, that is, he wishes the Court to order him to prefer such an indictment.



The petition sets up that the petitioner made a complaint on the 10th of July, 1896, before I. Wood, J.P., against Antonio Tanguay and L. Marc A. Lemieux, charging them with having stolen on the 20th of June, 1896, 75 saw logs belonging to the petitioner, of the value of \$37.50. On the 10th of July a summons was issued, returnable on the 20th. On the 20th the defendants appeared, and preliminary investigation was commenced before Messieurs A. G. Woodward and J. P. Royer, Justices of the Peace; evidence was taken on that and several following days. At the conclusion of the complainant's evidence, Marc A. Lemieux was discharged.

The investigation was from time to time adjourned until the 15th day of September, on which date the two magistrates made and signed a declaration in these terms: "We have not been able to agree on the finding, and we therefore discharge the *délibéré*."

The petition then alleges that the evidence was of such a nature that Antonio Tanguay should have been committed; that the conclusion arrived at by the magistrates was calculated to cause a miscarriage of justice; that the prosecution is tied up; that to commence the preliminary examination *de novo* would entail additional expenses of several hundred dollars; wherefore the petition prays the order of the Court to prefer an indictment.

The petition is supported by production of four exhibits: (1) copy of information; (2) copy of summons; (3) certified extract from minute of proceedings before the magistrates; (4) copy of their declaration discharging the *délibéré*.

Notice of this petition was served on Antonio Tanguay on the 24th of September. He appeared by counsel, who opposed the petition as being a novel and extraordinary application to which the article of the Criminal Code was

never intended to apply. The Court is not called upon to decide whether in any case such an order could be made on petition of a private prosecutor or not.

Par. 2 of Art. 641 speaks of three methods of authorizing the preferring of indictments:—

1. By direction of the Attorney-General.
2. By written consent of an Attorney-General or of a Judge.
3. By order of Court.

It is unnecessary in this cause to examine critically all the distinctions between "direction," "written consent," and "order of Court." It is enough to notice that there are distinctions, one of which would be that in cases of "written consent" the party preferring an indictment is a private prosecutor; in the other cases, viz., when the Attorney-General has directed it, or the Court has ordered an indictment, the indictment becomes a matter of public prosecution and the expenses are borne by the Crown.

Exactly in what cases a Court will order an indictment may be difficult to define, but it is safe to say that it will not do so unless it is brought to the *direct* knowledge of the Court in some way that an indictable offence has been committed, and that there is sufficient evidence to warrant a particular person to be indicted as the guilty party.

Has the Court any such knowledge in this case?

Absolutely none, except what the petitioner alleges, viz., that the two magistrates have investigated the charges and have discharged the *délibéré*.

The logical inference from this fact alone would be that there is not sufficient evidence up to that time.

It appears from their own declaration, however, that the *délibéré* has been discharged because they could not agree as to whether there is or is not a *prima facie* case.

Petitioner alleges that there is, and offers a suggestion

that in such a case the Court might find a way to obtain the record. How? There is no way, but by writ of certiorari, and for what purpose? to become an arbiter between two magistrates.

This would be a strange function to impose on the Court; practically constituting it a sitting magistrate with the two justices in order to get the opinion of the Court of Queen's Bench on a preliminary investigation.

Somewhat relevant to this question are the remarks of Mr. Justice Ramsay in the extradition case of *Narbonne*, referred to in Vol. 3, Legal News, page 15. In that case Chief Justice Dorion said: "We do not say that we have no right to issue a writ of certiorari. We have a right to issue a certiorari to see whether the commitment is conformable to the conviction. What we hold is that we have not a right to issue a certiorari to see whether a magistrate has committed a man according to the evidence."

Three reasons are urged in support of the petition:

1. There may be a miscarriage of justice.
2. The investigation is tied up.
3. The renewal would entail a large amount of costs.

These are all reasons, so far as they have any force at all, for bringing the matter to the attention of the Executive through the Attorney-General.

The Attorney-General is charged with the executive duty of preventing miscarriages of justice, and has a supervisory authority over the manner in which justices of the peace may be performing their functions.

2. It is said it is tied up.

How so? If these magistrates cannot agree, are they at liberty to discharge the *délibéré* and refuse to act? Are they not bound to pronounce a final order under Art. 594 of the Criminal Code? If they fail to agree, is it not because they are not both convinced that there is a *prima*

facie case? And in such a case is the accused not entitled to demand his discharge?

And then, what is the recourse of the private prosecutor under Art. 595 Cr. Code? He can bind himself over to prosecute, and being bound over, he needs no order of Court. He has it in his own power to prefer an indictment.

It may be true that in such a case he becomes bound, in the event of an acquittal, for the expenses of grand jury, petit jury, and witnesses; and it is not unreasonable that he should be, if he desires to prosecute a party as to whose guilt two magistrates cannot agree that there is even a *prima facie* case.

Petitioner wishes the Court to make an order and thus assume the responsibility of throwing expenses upon the Crown, which he himself is unwilling to take the risk of. Whether the Crown should or should not assume these expenses is clearly a matter which the Attorney-General, and not a Court, should decide. It is one of the legitimate functions of his executive capacity.

There is a further reason in a case like this why the matter is one for the notice of the Executive. The Attorney-General has powers of investigation which a Court has not. The magistrates hold their commission from the Executive, and if in the course of an inquiry conducted by the authority of the Attorney-General it should appear that one or other of the magistrates was improperly holding a commission, either from incompetency or other more objectionable cause, it would not only be within the authority, but would be the absolute duty of the Attorney-General to report the facts to the Lieutenant-Governor in Council, in order that such action might be taken as would effectually prevent the recurrence of such complaints as are contained in the present petition.

For all these reasons the Court conceives the matter is not one which is properly before it under Art. 641 of the Criminal Code. The petition is therefore rejected.

*Petition rejected.*

*H. B. Brown, Q.C., for petitioner.*

*L. E. Panneton, Q.C., and L. C. Belanger, Q.C., for the respondent.*

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## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, C.J. Q.B., AND STREET, J.

## THE QUEEN V. SPOONER.

*Disorderly house—Keeping house of ill fame—Charge of unlawfully “appearing the keeper”—Plea of guilty, effect of—Summary trial by police magistrate—Amendment of irregular conviction—Reducing excessive punishment—Public Prisons Act, R.S.C. c. 183, sec. 34—Cr. Code, secs. 198, 207, 783 (f), 784, 788, 896.*

1. Where it appears, on the return to a certiorari, that the convicted person is in close custody, the court may order a habeas corpus and hear together the motion to quash the conviction and the motion for the prisoner's discharge.
2. A plea of guilty to a charge heard before a city police magistrate, that the accused did, “unlawfully appear the keeper of a house of ill fame” is sufficient to justify a conviction for the offence of keeping a house of ill fame, because by Cr. Code, sec. 198 (2), any one who appears mistress or as the person having the care or management of any disorderly house shall be deemed to be the keeper thereof, and is punishable as such, although not the real owner or keeper thereof.
3. Where there is nothing upon the face of a conviction for keeping a house of ill fame to shew whether the police magistrate who tried the case acted under the “summary trials” clauses of the Code, by virtue of which he has an absolute jurisdiction in respect of that offence, or simply as a justice of the peace under the “summary convictions” clauses and of Code, sections 207 and 208, and the conviction is defective in form but is amendable if within the “summary convictions” clauses, and not amendable if under the “summary trials” clauses, the court will treat it as a “summary conviction” and correct the same under Code, section 889, by reducing the term of imprisonment where the sentence is in excess of that authorized by law.
4. *Semble*, upon indictment under Cr. Code, sec. 198, the offence of keeping a common bawdy-house is punishable in Ontario by a sentence to the “Mercer Reformatory” for any term less than two years under sec. 34 of the Public Prisons Act, R.S.C. c. 183, which section remains unrepealed by the Code.

ARGUED : December 22, 1900.

DECIDED : December 27, 1900.

Application to quash a conviction and for the prisoner's discharge under habeas corpus.

Upon the proceedings being brought into court under the certiorari it appeared that the person convicted was in close custody. The court, following the course pursued in *The Queen v. Randolph* [ante p. 165], there being sufficient material before it, directed a habeas corpus to issue in order that the application might be effectually dealt with in one proceeding.

An information had been laid against the prisoner on 16th November, 1900, before the police magistrate for the city of St. Catharines, that she did on the 14th November, 1900, at the said city of St. Catharines, "unlawfully appear the keeper of a house of ill fame," in a house situated in Church street in the said city.

Upon being brought before the magistrate she pleaded not guilty, and asked for a postponement of the trial until a later hour upon the same day, which was granted.

She then appeared with her counsel, Mr. J. C. Rykert, and, upon his advice, she withdrew her former plea and pleaded "guilty," and was thereupon convicted and sentenced to be imprisoned for one year in the Andrew Mercer (Ontario) reformatory for females.

The proceedings were then brought into the High Court by certiorari issued on behalf of the prisoner, and a rule nisi to quash the conviction was granted, and upon the return of the rule nisi, the prisoner was brought up on habeas corpus and both applications were heard together.

TORONTO, December 11 and 22, 1900.

*Robinette*, and *J. M. Godfrey*, for the prisoner: The defendant was not given an opportunity of electing to be tried by a jury. The magistrate proceeded under secs. 783 and 784 of the Code, and so could not impose a longer sentence than six months. The sentence is illegal

and cannot be amended under sec. 889 of the Code, which does not apply to summary trials of indictable offences, but merely to summary convictions. The conviction does not disclose any offence. "Appearing to be the keeper of a house of ill fame" is not an offence. We refer to *Regina v. Gibson* (1898), 2 Can Cr. Cas. 302, 29 Ont. R. 660; *Regina v. Murdock* (1900), 4 Can. Cr. Cas. 82, 27 Ont. App. 443; *The Queen v. Egan* (1896), 1 Can. Cr. Cas. 112; *Regina v. Justices of London* (1892), 17 Cox C. C. 526; *Regina v. Randolph* (1900), [ante p. 165].

*John R. Cartwright*, Q.C., Deputy Attorney-General, contra: By sec. 34 of R.S.C. ch. 183, the magistrate has power to commit to the Mercer for a period of two years. That Act was not repealed by the Code. In any event the magistrate may be considered as having proceeded under secs. 207 and 208 of the Code, and the court has power to amend under sec. 889. No objection was taken at the trial, before the prisoner pleaded, as is required by sec. 629. "Appearing to be" and "being" the keeper of a house of ill fame are one and the same thing.

*Robinette*, in reply: The term of two years provided for under sec. 34 of R.S.C. ch. 183, only applies to prosecutions under R.S.C. ch. 157, and no such prosecution can take place as that Act is repealed.

TORONTO, December 27, 1900.

The judgment of the court was delivered by

STREET, J.—

The objections principally urged to the validity of the conviction were:



1st. That no offence was charged in the information to which the prisoner pleaded "guilty"; and

2nd, That the police magistrate had imposed a punishment in excess of that authorized by the Criminal Code.

The conviction as originally drawn up followed the information, and convicted the prisoner that she did "unlawfully appear the keeper of a house of ill fame," but the conviction returned by the police magistrate upon certiorari is that she "did unlawfully keep a house of ill fame," and that she pleaded guilty to such charge.

The 198th section of the Code provides that everyone is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say any common bawdy house . . . as herein defined, and in the subsection to that section it is provided that "any one who appears, acts or behaves as master or "mistress, or as the person having the care, government or "management of any disorderly house shall be deemed to "be the keeper thereof, and shall be liable to be prosecuted "and punished as such, although in fact he or she is not "the real owner or keeper thereof."

By the 195th section, "a common bawdy house is a "house, room, set of rooms or place kept for purposes of "prostitution."

By the 207th section, "every one is a loose, idle or "disorderly person or vagrant who . . .

"(j) is a keeper or inmate of a disorderly house, "bawdy house, or house of ill fame, or house for the resort "of prostitutes."

And by section 208, as amended by 57-58 Vict., ch. 57: "every loose, idle or disorderly person or vagrant is "liable, on summary conviction, to a fine not exceeding "\$50, or to imprisonment with or without hard labour for "any term not exceeding six months, or to both."

By section 783, " whenever any person is charged before  
" a magistrate (*f*) with keeping or being an inmate . . .  
" of any . . . house of ill fame, or bawdy house, . . .  
" the magistrate may, subject to the provisions hereinafter  
" made, hear and determine the charge in a summary way."

By section 784, the jurisdiction of the magistrate to try a person charged with this offence, in a summary way, is absolute, and does not depend upon the consent of the accused.

By section 788: In any such case the magistrate after hearing the whole of the evidence may convict the person charged, and commit him to the common gaol or other place of confinement for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, \$100, or to both fine and imprisonment not exceeding the said sum and term, etc.

Under the sections to which I have referred it appears that the offence of being the keeper of a house of ill fame is an indictable offence, and that it may be tried either before a jury in the ordinary way, or before a police magistrate under the "summary trials" clauses, or before a police magistrate or justice of the peace under the "summary convictions" clauses of the Criminal Code.

The punishment upon conviction under the summary convictions clauses, by way of imprisonment when costs are not imposed, is limited to six months.

When the prisoner is tried by a jury in the ordinary way he may be sentenced under sec. 198 of the Code to a year's imprisonment, or apparently, under sec. 34 of ch. 183 of the Revised Statutes of Canada, which is one of the statutes not repealed by the Code, to two years' imprisonment in the Andrew Mercer reformatory.

It was argued before us on behalf of the prisoner that this sec. 34 could not be treated as being in force, because

the two Acts referred to in it are repealed and re-enacted by the Code; but it is plain from sub-sec. 51 of sec. 7 of ch. 1 of the Revised Statutes of Canada (the Interpretation Act) that the reference to the statutes in question by their original names is as effectual as if the reference had been to the sections of the Code substituted for them.

There is nothing upon the face of the conviction before us requiring us to hold either that the police magistrate, who is, of course, a justice of the peace (see sub-sec. (a) of sec. 839), was trying the prisoner under the summary trials clauses, or under the summary convictions clauses. In all essential parts the conviction stands as well under one as under the other procedure, and it is only because the sentence is one which could not be imposed by a justice under the summary convictions clauses that we obtain any clue guiding us to the clauses under which the magistrate supposed himself to be acting.

Are we bound to follow this clue, and none other? Or may we support the conviction, amending the sentence, under the summary convictions clause if it appears that the ends of justice will be better served by so doing than by treating the conviction as necessarily made under the summary trials clauses? The question is, I think, important in view of the fact that the powers of amending convictions are much greater under the former than under the latter procedure.

In my opinion to order the absolute discharge from custody of a prisoner who, after due deliberation, has plainly intended to plead guilty to the offence of being the keeper of a house of ill fame, solely because she has been sentenced to a year's instead of to six months' imprisonment, where we have power to correct the sentence, would lead to a manifest failure of justice, and would be contrary to the spirit of the powers of amendment given by the

Code. I therefore proceed to treat the conviction as having been made under the summary convictions clauses of the Code.

Under sec. 889 of the Criminal Code it is provided that no conviction shall, on being brought up by certiorari, be held invalid for any irregularity, informality or insufficiency therein, provided the court before whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction has been committed over which the justice convicting has jurisdiction; and that the court when so satisfied as aforesaid shall, even if the punishment imposed is in excess of that which might lawfully have been imposed, may modify the sentence and exercise any power which the justice convicting might have exercised.

And by sec. 896 of the Code, whenever it appears by the conviction that the defendant has appeared and pleaded and the merits have been tried, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

Upon being brought before the magistrate and charged with appearing the keeper of a house of ill fame, the prisoner pleaded guilty. This was a trial upon the merits, and the plea was an admission by the prisoner that she appeared to be the keeper of such a house. By sub-sec. 2 of sec. 198 of the Code, a person who appears to be the keeper of such a house is "deemed" to be the keeper thereof, so that the prisoner having admitted that she appeared to be the keeper of the house is to be deemed for the purposes of the prosecution to be guilty of the offence, and the amended conviction which has been returned to us with the certiorari did not substantially vary from the

conviction as originally drawn up, and the original conviction and commitment should be amended accordingly.

To avoid any possibility of the appearance of straining the law against the prisoner by upholding the conviction, and giving to her every benefit of her objections to which she is entitled, I think we should amend the conviction and modify the sentence by reducing it from one year to six months, and the order to be taken out upon this motion will set forth that we have exercised the powers conferred on us by sec. 889 of the Code by so doing. In other respects the rule nisi should be discharged.

*Conviction amended.*

**Note:** *Disorderly house—Keeping house of ill-fame—Evidence—Cr. Code 198, 207, 783 (f).*

Keeping a house of ill-fame or disorderly house is a cumulative offence, and although the charge is in general terms, evidence may be given of particular facts and of the particular time of such facts. *Clarke v. Periam*, 2 Atk. 339; Roscoe's Crim. Evid., 11th ed. 773. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain an indictment: *Anson v. Stuart*, 1 T.R. 754.

A common bawdy house is defined by sec. 195 of the Criminal Code to be a house, room, set of rooms or place of any kind, kept for purposes of prostitution. It is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside. Steph. Crim. Law, 122.

The term "house of ill-fame" is synonymous with "bawdy-house," Century Dict., *verb*, "house." A "brothel" is a place where people of opposite sexes are allowed to resort for illicit intercourse. A house occupied by one woman for the purpose of prostituting herself therein with a number of different men, but not allowing other women to use the premises for a like purpose is not a brothel: *Singleton v. Ellison*, [1895] 1 Q.B. 607; 64 L.J.M.C. 123.

In the United States it has been held that a flat-boat floating on a river may be a "house of ill-fame," *State v. Mullin*, 35 Iowa 199; and that a tent may be a "disorderly house," *Killman v. State*, 2 Texas Ct. App. 222; or a room in a steamship, *Com. v. Bulman*, 118

*Note—Continued.*

Mass. 456. The word "house" as used in statutes for the suppression of "disorderly houses" is used in a generic sense, and applies to nearly all kinds of buildings, and is not restricted to dwelling houses: *State v. Powers*, 36 Conn. 77.

The keeping of a bawdy-house is a nuisance indictable at common law, 3 Inst., c. 98, p. 204, 1 Hawk. P.C., c. 74 and 75, s. 6, and the common law punishment was by fine or imprisonment, but without hard labour.

A feme covert may be guilty of the offence as well as if she were a feme sole, for the *keeping* the house does not necessarily import property but may signify that share of government which the wife has in a family as well as the husband: *R. v. Williams*, 1 Salk. 383. If a person be only a lodger and have only one room in a house, the use of that room in the way of a bawdy-house will constitute the keeping of a bawdy-house: *R. v. Pierson*, 2 Lord Raymond, 1197; 1 Salk. 382.

It is not necessary that it should be proved that any indecent or disorderly conduct was visible from the exterior of the house: *R. v. Rice*, L.R., 1 C.C.R. 21.

The sub-section as to acting or appearing as the mistress of the house, Cr. Code 198 (2), originated in the English "Disorderly Houses Act, 1751," 25 Geo. 2, c. 36. By section 8 of that statute it was enacted that any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not be in fact the real owner or keeper thereof. That statute made no change in the nature of the offence and it has been held, under the section mentioned, that where the real owner of the house does not live in the house and cannot exercise an effective control over the purposes for which the house is used as where he lets it, parting with the exclusive right of occupation either to one or to several tenants, he cannot be made responsible although he may have known beforehand of the uses to which the house or the part of it so let is intended to be put. In *R. v. Barrett*, 32 L.J.M.C. 36, the accused let a house to a weekly tenant who used it as a brothel, but it was not proved that the accused received any additional rent by reason of the nature of the occupation or in any way participated in the direct profits of the immorality carried on there; but he had notice that the house was used for immoral purposes, and he did not give the tenant notice to quit. It was held that he could not be convicted of keeping the house as a disorderly house.

*Note—Continued.*

In *R. v. Stannard*, 33 L.J.M.C. 61, the owner of a house let it in separate apartments on weekly tenancies to several women, who with his knowledge and consent used them for purposes of prostitution. He did not himself live in the house, and received no direct share in the immoral gains of the women, nor had he any control over them except such as might arise indirectly from his power as landlord to terminate any tenancy at the end of a week. It was held that he could not be convicted of keeping the house.

It is submitted that the decision in *Spooner's Case*, *supra*, was wrong in treating the plea of guilty to the informal charge of "*appearing* the keeper of a house of ill-fame" as equivalent to an admission that she kept a house of ill-fame.

The words used in the charge did not charge an offence known to the law under that form of words so as to give them any technical meaning, nor do they follow the phraseology of sub-section (2) of section 198 which enacts that "Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house [any common bawdy-house, common gaming-house or common betting house as defined by secs. 195, 196 and 197] shall be *deemed to be* the keeper," etc. The section does not become operative until the fact that the house is a disorderly house is proved or admitted. The offence is, by its nature, one to be proved by shewing a series of circumstances, constituting the house a disorderly one, a continued use of the same for purposes of prostitution where the charge is for the keeping of a common bawdy-house. Does the accused admit either such continued keeping of the house for purposes of prostitution or the ill reputation of the house by admitting that she appears the keeper of a house of ill-fame? The meaning of the words should not be extended beyond their ordinary acceptance, and if there be any ambiguity the construction most favorable to the prisoner should be taken. In common parlance a person may be said to *appear* such keeper if she were unquestionably the keeper of a house which had some of the appearances or indications of being a house of ill-fame, but in point of fact was not. And an isolated act of prostitution carried on in the house with the connivance of the mistress thereof might make such mistress *appear* the keeper of a bawdy-house, although the house was in fact one of good repute. It is submitted that the decision would have been much more satisfactory had the conviction for "keeping" been set aside as not warranted by the plea of guilty to "appearing the keeper" and the commitment set aside as not disclosing any offence known to the law.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., BOSSE, BLANCHET,  
HALL AND WURTELE, JJ.

## THE QUEEN v. BOYD.

*Impanelling the jury—Direction to stand by—Claim to exercise right on second call after panel once exhausted—False pretences—Obtaining only a credit in account—False statement of affairs to bank—Attempt to obtain money by false pretence—Evidence—Proof of credence of corporation in the pretence—Proof of insolvency by facts subsequent to the representation—Cr. Code secs. 359, 667, 668, 711, 735.*

1. The Crown has not the right to direct jurors to stand by when they are called a second time, after the panel has been exhausted by challenges and directions to stand by.
2. On an indictment for the offence of having obtained money by false pretences, the defendants cannot be convicted of the full offence when it is proved that by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen, but they might, if the evidence should establish an attempt to obtain the money, be convicted of such attempt.
3. To prove that the board of a corporation had acted on the faith of the false representation made, it is not necessary to examine one or more of the directors, if the fact can be proved by other competent witnesses.
4. Evidence is admissible of facts which are subsequent to the false representation, to prove the insolvency of the defendants a very short time after the false representation had been made, as an evidence of their knowledge of its falsity when they made it.

DECIDED: February 25, 1896.

Daniel Boyd and Andrew Sommerville were tried in the Court of Queen's Bench in the District of Beauharnois, and on the 7th day of January, 1895, were found guilty of having obtained money by false pretences upon the following indictment:—

"The jurors for Our Lady the Queen present: that Daniel Boyd and Andrew Sommerville, then and there



traders and co-partners doing business together as such at the village of Huntingdon, in the said District of Beauharnois, under the name, style and firm of Boyd & Company, obtained by false pretences from the Eastern Townships Bank, a body politic and corporate by law, fifty-one thousand, seven hundred and forty-nine dollars and seventy-eight cents, current money of Canada, on the 30th day of December, in the year of our Lord 1893, with intent to defraud."

After the verdict was rendered the defendants' counsel asked that four questions of law should be reserved for the opinion of the Court of Appeal. Two were reserved by the trial judge, and leave to appeal was granted for the other two.

The case was then submitted on the four points raised.

MONTREAL, February 25, 1896.

The judgment of the court was delivered by

WURTELE, J.—

Daniel Boyd and Andrew Sommerville, who had been traders and partners, carrying on business together in the village of Huntingdon, in the District of Beauharnois, under the style of Boyd & Co., were indicted before the Court of Queen's Bench, in the District of Beauharnois, for having obtained by false pretences from the Eastern Townships Bank, \$51,749.78 on the 30th day of December, 1893, with intent to defraud; and they were found guilty on the 7th day of January, 1895.

The Merchants' Bank of Halifax had a branch at Ormstown, in the District of Beauharnois, of which the principal business seems to have been to provide funds for the operations carried on by the firm of Boyd & Co., and,

in fact, towards the end of December, 1893, the firm had an overdraft to the extent of \$51,570.40. The defendants applied to the Eastern Townships Bank for a loan or credit to the extent of \$60,000, and, at the same time, negotiations took place for the purpose of transferring the business carried on at Ormstown by the branch of the Merchants' Bank of Halifax to the branch of the Eastern Townships Bank at Huntingdon, in the District of Beauharnois. Before coming to any decision, the management of the Eastern Townships Bank called upon the defendants for a statement of their affairs, and, in response to this demand, a statement was prepared and was laid before the Board of Directors of the Eastern Townships Bank, on the 5th December, 1893. The general manager of the bank, relying upon the truth of the statement, but without having made any examination to verify it, recommended the loan or credit to the board, and thereupon the board, also relying on the truth of the statement, agreed to grant the discount or credit asked for. At the same time, the Eastern Townships Bank agreed that its branch should take over the business of the branch of the Merchants' Bank of Halifax. The Eastern Townships Bank discounted a note of \$53,000, at four months, for the defendants, and placed the proceeds, being \$51,749.78, to the credit of the firm, in the books of its branch, which had, on the same day, taken over the business of the branch of the Merchants' Bank of Halifax, and, thereupon, the defendants were debited with their overdraft of \$51,578.40, leaving a balance on the proceeds of the discount of their note of \$179.38 to their credit, for which they could have obtained the money on their cheque, but did not do so. Within a very few days the defendants were obliged to make an abandonment of their estate, and it was discovered that they were hopelessly insolvent, and

that the statement furnished by them to the Eastern Townships Bank was false.

In looking at this affair, one cannot help feeling surprised at the confiding simplicity with which the managing officials recommended a financial institution to embark in such a large transaction, without having taken any steps to verify the exactitude of the statement showing the position of the firm, on whose operations the success of the business which it had been asked to take over was mainly dependent; but this is, of course, no excuse for the defendants having taken advantage of this disposition to submit a false and misleading statement.

Before the jury had been formed the panel was exhausted by challenges made by the defendants, and by the directions of the Crown to stand by. Then the names of those who had been directed to stand by were again called, and fourteen of them were directed to stand by a second time. This was objected to, at the time, by the counsel for the defendants, but the objection was overruled, and none of these fourteen jurors were sworn.

In proving its case the Crown did not call any of the directors of the Eastern Townships Bank as witnesses to shew that the discount or credit had been granted by the board on the faith it had in the statement, which was afterwards found to be false, but it relied upon the evidence of the agent of the bank at Huntingdon, and of the general manager, Mr. Farwell.

Then a great deal of evidence was made by exhibits and by witnesses, as to matters which took place subsequently to the 30th December, 1893, on which day the discount or credit had been granted. This evidence was made to shew the insolvency, not only of the firm of Boyd & Co., but of both of the defendants individually, and of the firm of Cornwall & Co., of which Daniel Boyd

had been a member, and to which the other defendant, Andrew Sommerville, had lent his credit, and the improbability of the defendants not being aware of their financial position, and of the false representation made of it by the statement which they had furnished to the Eastern Townships Bank.

At the trial the defendants' counsel raised the objection that it was necessary to establish that the Board of Directors had been induced to grant the discount or credit by the false statement which had been submitted to them, and, also, that the admission of the evidence tending to prove the insolvency of the defendants, and the presumption that they were aware of their position and of the falsity of their statement, was illegal; but the case was submitted to the jury without any special adjudication on the objection, the trial judge having expressed the opinion that the objection was not well founded, and the counsel of the defendants not having insisted upon an adjudication.

After the verdict, the defendants moved to have four questions of law reserved for the opinion of the Court of Appeal, and the two following questions were reserved by the trial judge :—

1. Had the Crown the right to direct fourteen jurors, when called a second time, again to stand aside, and does the fact of their not having been sworn affect the validity of the trial and of the verdict ?

2. Did the defendants obtain from the Eastern Townships Bank, by false pretences, with intent to defraud, anything capable of being stolen, by the discounting of a note and the placing of the proceeds to their credit in the books of the Eastern Townships Bank ?

The court allowed an appeal on the two other questions of law, and the trial judge has stated a case, with respect to them, for our opinion.

The questions of law for which an appeal has been allowed are :—

3. Was it necessary to prove, by one or more of the directors, that the board had relied, in granting the discount or credit, on the statement which the defendants had furnished, and should the conviction be quashed because such proof has not been made ?

4. Should the evidence made to establish the insolvency of the defendants, and their knowledge of their position and of the falsity of the statement which they had produced, have been excluded, and should the conviction be quashed because such proof was made ?

I will now take up the questions of law submitted for the opinion of this court, in the order in which I have given them.

The first question is, whether the Crown had the right to direct jurors to stand by after the panel had been exhausted, when those who had been directed to stand by had been called a second time ?

To answer this question, it will not be necessary to refer to books on criminal procedure, as the Criminal Code itself contains an answer in the clear provisions to be found in it with respect to the formation of a jury. Paragraph 4 of article 667, enacts that, if when proceeding to form a jury the panel is exhausted by challenges and directions to stand by, those who have been so directed to stand by shall be called again in the order in which they were drawn and shall be sworn, unless challenged by the accused, or unless the prosecutor—that is to say, the Crown—challenges them and shews cause why they should not be sworn. Then paragraph 9 of the next article (Cr. Code 668) gives the Crown the power to challenge four jurors, and no more, peremptorily, and provides that the Crown may direct any number of jurors, not peremptorily

challenged by the accused, to stand by, until all who are available have been called. It is clear, under these provisions that the Crown only has the power to challenge peremptorily four jurors, and only has the right to direct jurors to stand by when the panel is called over for the first time. If the Crown had the right to direct jurors, when called the second time, to stand by, it would virtually have more peremptory challenges than the number allowed to it. The ruling by the trial judge that the Crown had a right to direct fourteen jurors to stand by a second time, was therefore erroneous, and the effect of such ruling and of the consequent formation of the jury, was that there has been a mis-trial. It was suggested, at the argument, that the provisions of article 735 of the Criminal Code covered the case, and made it impossible to impeach the verdict on account of the manner in which the jury had been formed, but the article in question refers merely to the procedure with respect to the making of the jury lists and the formation of the panel under the provisions of the Provincial Statutes respecting jurors and juries, and does not in any way, apply to the choosing or formation of a jury under the Criminal Code from the panel returned by the Sheriff. We must therefore, on account of their having been a mis-trial, set aside and quash the verdict which was rendered.

The second question is whether the defendants, by false pretences, with intent to defraud, had obtained, from the Eastern Townships Bank, anything capable of being stolen.

The indictment is laid under article 359 of the Criminal Code, which provides that those who, with intent to defraud, by any false pretence, obtain anything capable of being stolen are guilty of an indictable offence, and are liable to three years' imprisonment.

In this case the defendants obtained the discount of a note of which the proceeds, amounting to \$51,749.78, were placed to their credit in the books of the branch of the Eastern Townships Bank. Did they obtain from the bank, when they got this credit, a thing which was capable of being stolen? A thing capable of being stolen is, naturally, a thing which can be taken out of the possession of the owner, carried away, and appropriated by the taker. It is evident that a credit given to a person does not fall within this definition, and that, consequently, it is not a thing capable of being stolen. It has been held that the offence of obtaining by false pretences is not committed, where the false pretence practiced does not, at once, obtain money, but merely a credit in account, although such credit might, eventually, bring money; but that although a transaction, by which a person, by false pretences, obtains a credit in account, does not constitute the substantive offence of obtaining money by false pretences, it may constitute a criminal attempt to get, by false pretences, the money which the credit may ultimately bring. This principle is set out in clear terms by Bishop, in the 2nd volume of his work on the Criminal Law, sec. 480; and in the case of *The Queen v. Eagleton*, Dearsley's Crown cases, p. 515, where the defendant was credited in account for the price of loaves of bread which he had falsely represented to have delivered, it was held by the Court of Criminal Appeal on counts for having obtained money by false pretences, that as he had only obtained credit in account he could not have been convicted of obtaining money by false pretences, but that he was properly convicted of the attempt to obtain money. Article 711 of the Criminal Code enacts, that when the complete commission of an offence is not proved, but the evidence establishes an attempt to commit the offence, the accused may

be convicted of such an attempt and punished accordingly. In the present case, it is clear, under the evidence, which shews that the defendants had obtained a credit in account, out of which, however, they could have obtained money for a balance of \$179.38, that they should not have been convicted of the complete commission of the offence charged of obtaining money by false pretences, although they might have been convicted of an attempt to obtain money by means of the false pretences which were proved.

The question submitted for the opinion of this court by the trial judge, is simply whether the defendants had obtained from the Eastern Townships Bank anything which was capable of being stolen, and our answer to this question is, simply, that they did not obtain anything which was capable of being stolen. The verdict which found them guilty of obtaining money by false pretences cannot, for this reason, in addition to the circumstance of there having been a mis-trial in consequence of the illegal formation of the jury, be sustained, and we therefore for this last reason also set it aside and quash it. We are not called upon to say whether the defendants should have been acquitted in all events, and we, therefore, do not proceed further, and neither order their discharge nor make any other order respecting them.

I now come to the two last questions:—The one, whether it was necessary to examine one or more of the directors, in order to prove that the board had been induced to grant the discount or credit from having relied upon the false statement which had been submitted to it; and the other, whether the admission of the evidence of circumstances which were posterior to the granting of the discount or credit, was admissible for the purpose of proving the financial position of the defendants within a very



short period after such discount or credit had been given, and the fact that the defendants knew their financial position at the date of the statement which they had furnished, and the falsity of such statement.

It will be sufficient for me to say that we are of opinion that it was not necessary to examine one, or more, of the directors, if it was possible to prove the false pretence, and that the directors relied upon it, by the evidence of other competent witnesses: and that the proof of the subsequent circumstances was admissible to establish the financial position of the defendants, and their knowledge of such position at the time the false pretence was made. We are of opinion, therefore, that the objections taken by the counsel of the defendants, in these respects, were unfounded, and we, therefore, answer the two last questions in the negative.

The judgment of the court is that the conviction be set aside and quashed.

*Conviction quashed.*

*J. K. Elliott, Q.C., and A. W. Atwater for the Crown.  
J. J. Macdaren, Q.C., for the defendants.*

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## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, TOWNSHEND, MEAGHER,  
AND HENRY, JJ.

## THE QUEEN v. HAWBOLT.

*Summary proceedings before justices—Dismissal of complaint—Appeal by prosecutor—Trial de novo on appeal—Appeal allowed and accused convicted—Costs of appeal—Jurisdiction to include in conviction—Recovery by distress and imprisonment—Extending punishment—Canada Temperance Act—Cr. Code, secs. 880, 883.*

1. Code section 883 which authorizes the Court on hearing an appeal from a summary conviction or order of a justice, to try the case upon its merits and to make a new conviction or order, applies to an appeal by the prosecutor from the justice's order dismissing the complaint.
2. Where an order is made allowing the prosecutor's appeal and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default.

ARGUED: December 11, 1899.

DECIDED: March 13, 1900.

Defendant was summoned to appear before two justices of the peace for the county of Guysborough, to answer a charge of having, at Marie Joseph, in said county, on or about March 9th, 1898, unlawfully sold intoxicating liquors at retail, without license therefor, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said county.

Defendant appeared at the time and place mentioned in the summons, and, evidence having been heard, the justices dismissed the charge as not proved.

An appeal was taken by the license inspector, to the next term or sittings of the county court, to be holden at Sherbrook, in said county, and, the appeal having been heard, it was ordered that the order of dismissal be set aside and quashed, and that defendant be convicted of the

short period after such discount or credit had been given, and the fact that the defendants knew their financial position at the date of the statement which they had furnished, and the falsity of such statement.

It will be sufficient for me to say that we are of opinion that it was not necessary to examine one, or more, of the directors, if it was possible to prove the false pretence, and that the directors relied upon it, by the evidence of other competent witnesses; and that the proof of the subsequent circumstances was admissible to establish the financial position of the defendants, and their knowledge of such position at the time the false pretence was made. We are of opinion, therefore, that the objections taken by the counsel of the defendants, in these respects, were unfounded, and we, therefore, answer the two last questions in the negative.

The judgment of the court is that the conviction be set aside and quashed.

*Conviction quashed.*

*J. K. Elliott, Q.C., and A. W. Atwater for the Crown.*

*J. J. MacLaren, Q.C., for the defendants.*

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An appeal was taken by the license inspector, to the next term or sittings of the county court, to be holden at Sherbrook, in said county, and, the appeal having been heard, it was ordered that the order of dismissal be set aside and quashed, and that defendant be convicted of the

offence charged, and that, for such offence, he forfeit and pay the sum of \$50, and also pay the inspector the sum of \$27.16 for his costs; that the same be levied by distress and sale of defendant's goods, and, in default of sufficient distress, that defendant be imprisoned in the common jail of the county, for a term of thirty days, unless said several sums, and all costs and charges of said distress, and commitment, and of conveying defendant to jail, were sooner paid.

A motion was made before Meagher, J., in Chambers, on behalf of defendant, for a writ of certiorari, to remove into the Supreme Court at Halifax the record of conviction.

The application was made on the following grounds:

1. Because said conviction is bad in law.
2. Because the time said offence was committed is not stated in said conviction.
3. Because the judge of the county court exceeded his jurisdiction, and imposed a greater penalty than the law allows.
4. Because said conviction imposes imprisonment in default of payment of costs of commitment.
5. Because said conviction imposes distress and imprisonment in default of payment of costs of appeal to the county court.

The learned Judge refused the writ in respect to the ground urged that costs of commitment were improperly included in the conviction, mentioning *The Queen v. Doherty*, 32 N.S.R. 235, but allowed the writ to go on the other ground, viz., because the costs upon the appeal to the county court were included in the conviction.

The court was now moved for an order to quash and set aside the conviction made by the learned county court Judge on the grounds already mentioned, and on the

further ground that costs of said appeal were included in said conviction.

HALIFAX, December 11, 1899.

*J. A. Chisholm*, in support of motion : [MEAGHER, J.—You have taken grounds which were not taken below.] We are entitled to take any grounds. [MEAGHER, J.—I never understood that to be the rule.] Crown Rule 33 ; Short & Mellor's Crown Office Practice, p. 129 ; *The Queen v. Purdy*, 33 L.J., Mag. Cas. ; *The Queen v. McDonald*, 26 N.S.R. 94. The county court Judge could not include in the conviction the costs of appeal. Crim. Code, sec. 880. The proper course for the Judge below was to direct the payment of the costs to the officer of the court. [RITCHIE, J.—We could amend the conviction here. MEAGHER, J.—That is not a ground for certiorari. It is not a matter of jurisdiction.] The term is for a longer period than is provided in the statute. Crim. Code, sec. 898 ; *The Queen v. Gavin*, 30 N.S.R. 162. While the county court Judge may award costs, he has no power to impose them as a part of the conviction. Under sec. 883, the only order which the county court Judge can make, is the order which should have been made by the justice. Crim. Code, secs. 884, 885 and 889, indicates that the costs of appeal must be dealt with separately. The conviction should disclose that the preliminary steps necessary to the appeal had been taken.

*A. McGillivray* and *F. T. Congdon*, contra : The notice of motion does not raise the question under sec. 897. The conviction does not shew that the costs inserted were the costs of the appeal. Sec. 897 only applied up to the time when the provisions as to appeal were extended to the complainant. *Bank of England v. Vagliano Brothers*

(1891), App. Cas. 145. Statutes of Canada, 1888, ch. 45, sec. 7, for the first time, gave an appeal to the complainant. Statutes of Canada, 1880, ch. 37, sec. 26. Even if costs are directed to be paid to the wrong party the conviction is not invalidated. The county court has the same power to make an order as to costs of appeal that the magistrate has to dispose of the costs before him, and the same procedure as to costs is applicable in each case, namely, the procedure provided by the Canada Temperance Act. *Ex parte White*, 33 Can. Law Jour. 776; Statutes of Canada, 1888, ch. 34, sec. 14; *The Queen v. Rood*, 28 N.S.R. 163; *Gay v. Matthews*, 4 B. & S. 434. Under ch. 106, secs. 117 and 118 this is simply a defect which does not invalidate the conviction. The whole question turns upon the construction of sec. 883. The statute is drawn in exact analogy to the provisions for appeals in this court in actions. The words are broad enough to give the county court Judge all the powers conferred on the justice by sec. 872.

*J. A. Chisholm*, in reply, referred to Code, sec. 869. There is no provision made for imprisonment for non-payment of costs on appeal.

HALIFAX, March 13, 1900.

MEAGHER, J.—

Upon the trial of an information, charging the defendant with a violation of the provisions of the second part of the Canada Temperance Act, before two justices, they dismissed it, and made a formal order of dismissal under date of June 24th, 1898.

From such order of dismissal an appeal was taken by the prosecutor to the county court under sec. 879 of the Code, which enacts that :

"Unless it is otherwise provided in any special Act, under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal."

There are other sections which provide the necessary procedure and forms, to bring such appeal on for trial, or to dispose of it otherwise, if not duly prosecuted.

Sec. 858 enables the justice, upon the hearing of an information or complaint, to determine the same and to convict or make an order against the defendant or to dismiss the information or complaint as the case may be.

By the provisions of sec. 862, if the justice dismisses the information or complaint, he may, when required to do so, make an order for dismissal in the form BBB in schedule one to the Act.

"That form is headed "Form of order of dismissal of an information or complaint." It contains full recitals of the proceedings, and of the fact of dismissal, and an adjudication that the prosecutor or complainant do pay the defendant the sum of \$. . . . for his costs, etc, and if not paid forthwith (or on or before . . . . .) that the same be levied by distress, etc., and in default imprisonment for the term of . . . . . unless said sums, etc., are sooner paid.

There is thus provided the same adjudication in respect to the method of enforcement of the costs as is provided in respect to the enforcement of a penalty. Upon payment of the costs the imprisonment ends, and equally so in the case of a penalty; so that it is a method merely of enforcing payment in the case of a penalty as well as where costs merely are awarded. See as to this sec. 866. I am unable to see any distinction unless it lies in the mere fact that the one may be greater than the other.



That feature may create a distinction where the outside imprisonment for the penalty might be three months, while that for costs might be for thirty days only. There, perhaps, there would be an excess of jurisdiction. But there is no excess here, because the imprisonment awarded as to both does not exceed the maximum which might be imposed as to costs, viz., thirty days.

Sec. 868 authorizes the justice, where he dismisses the information or complaint, in his discretion, to award and order that the prosecutor or complainant shall pay to the defendant such costs, etc.

Secs. 869 and 870 make the costs recoverable as a penalty, and by the same means and methods; but the latter section, where no penalty is adjudged, limits the imprisonment to one month. If the justices imposed a penalty and awarded costs, as was done by the county court in this instance, it is, I think, clear that, so far as imprisonment is concerned, the party would be imprisoned in respect to these for the same period as he would for the penalty. In such a case no distinction is made. This view may be material when the sections which endow the county court with powers at least co-extensive with those of the justices, come to be considered.

Sec. 873 enables the justice, when he makes an order dismissing an information or complaint with costs, to issue a warrant of distress therefor, and, in default, a warrant of commitment. Both forms are prescribed.

Sec. 880, sub-sec. (e) provides that the court to which such appeal is had shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs below, as seems meet to the court, and in case of the dismissal of an appeal by the defendant and affirmance of the conviction or order, shall order and adjudge the appellant to be

punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

By sec. 881 it is declared that the Court of Appeal shall try, and shall be the absolute judge, as well of the facts as of the law in respect to such conviction or decision.

Sec. 882 prohibits a judgment being given in favour of the appellant if the appeal is based on matter merely of form, unless it is proved that such objection was made before the justice below.

We then come to sec. 883, which I shall quote :

“ In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose decision is appealed from might have exercised ; and such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice. The court may also make such order as to costs to be paid by either party as it thinks fit.”

The judgment of the county court, I submit, may be expressed, no matter whether it deals with a conviction or order, in the form of an order, which would under the statute be enforced just as if it were in the form of a conviction or order, according to the exigencies of the case,

and the terms of the statute governing the particular instance. By sub-sec. (e) it has been seen that power is given to the county court to hear and determine the matter of appeal and to make such order therein as seems meet to such court.

By sec. 880 the court, upon the appeal coming before it in due form, must try, and is declared to be the absolute judge of, the facts and law involved in such appeal in respect to the conviction or decision appealed from.

Sec. 882, in respect to the decision of such appeal court, refers to it as a judgment, and when we examine sec. 883 we find that it imposes upon such court, "in every case of appeal from a conviction or order"—and more general words could not be used—the duty and task of hearing and determining the charge or complaint on which such order or conviction has been had or made upon the merits.

- An order of dismissal is surely as much an order made on, and in respect to, the charge or complaint, as a conviction, or an order adjudicating a penalty, or payment of a sum of money would be. The information is the foundation of such an order, and the order which dismisses it is an order on it.

The court must then, where there is, as here, an order of dismissal, and an appeal by the prosecutor, try whether the charge or matter of the information is true or not. When it has done that, it is required by sec. 883 to determine such charge upon its merits; and then by its judgment spoken of in prior sections, or by its order or process spoken of in this section—such court is to confirm the conviction or order of dismissal (whichever was the subject of the appeal before it), or reverse or modify the decision of such justice, or make such other conviction or order in the matter as it thinks just, and may by such order, that is by its order, to be made upon the disposition

of the appeal, exercise any power which the justice, whose decision is appealed from, might have exercised, and such conviction or order shall have the same effect, and may be enforced in the same manner as if it had been made by such justice.

By a sub-sec. to 883 the conviction or order made by the court on appeal may also be enforced by process of the court itself.

I hope I may be pardoned for saying that, in my opinion, more comprehensive language could not be used to shew the jurisdiction of the county court to deal with the matter of this appeal, and to try it upon its merits, to confirm it, or to reverse it, which latter would mean discharging the order of dismissal and making a conviction or order upon the merits and imposing a penalty with or without costs, as the court deemed proper, or to modify it, or to make such other conviction or order as the court thought just, and this irrespective of whether it was an appeal by the prosecutor or the defendant. Still further we find that the court, in respect to the conviction or order, which it makes upon the merits, is also empowered to exercise any power which the justice whose decision is appealed from might have exercised.

The justice could, as I have shewn, enforce his conviction by a distress warrant and imprisonment for a given time, or until the defendant sooner paid the penalty and costs.

The same power is given to the county court in respect to the order or conviction which it makes; and which is to be enforced in the same manner as if made by the justice, so that the county court may impose a penalty, may reduce it or increase it (within prescribed limits of course), may likewise increase or reduce the imprisonment and may impose costs which may be included in its order

or judgment, or conviction, or may dismiss the complaint or information according to the exigency of the case, and its determination of the merits.

It should not be forgotten that this part of the Code deals with all appeals, whether from convictions in the merely technical sense of that term as applied to justices, or from orders directing the payment of a sum of money, or the doing of an act such as abating a nuisance or the performance of some other duty ordered to be done, as well as from orders dismissing an information or complaint, and therefore it is that general words are used.

I have gone over sec. 883 with great care and am unable to limit it, as I understand it is being limited by some of my learned associates, to appeals by a defendant where he has been convicted, or an order has been made against him. To give it that reading I am obliged to limit its general words and to assign to words a narrow technical construction where I am persuaded none was intended, and I must also regard as idle or superfluous many words I find there, but for which, when read as I read it, there is an obvious office and use. Moreover, a reading contrary to my view renders nugatory and useless an appeal in a case like the present, although the right of appeal is clearly given and the appeal court is obliged to try the merits of such appeal.

Paley on Convictions, page 310, says: "Although the question has not yet been settled the better opinion seems to be that a conviction is included in the words 'order or judgment.'"

The word "conviction" is an equivocal word, but in strict legal sense it is used to denote the judgment of the court. Stroud's Judicial Dictionary, 159, citing Tindal, C.J., in *Burgess v. Boetefeur*, 7 M. & G. 481; see also *Jephson v. Barker*, 3 T.L.R. 40, per Stephen, J.

The conviction which sec. 883 refers to as the one to be enforced is the conviction, order or judgment made in the county court. No distinction is there made, and, so far as I can perceive, none was contemplated, between the penalty adjudged and the costs. Both are necessarily included in the term conviction where it is spoken of in the statute as the thing to be enforced, and this is especially so if it be true that the strict legal sense of the term conviction means the judgment of the court.

The words which form the concluding part of the first portion of sec. 883, namely: "The court may also make such order as to costs to be paid by either party as it thinks fit," do not militate against the view I have expressed. This has no reference to the method of enforcing costs which have been awarded, and is nothing more than a provision enabling the court to award or withhold costs in its discretion.

Sec. 884 is intended to cover a case where the appeal has not been prosecuted, and it makes special provisions for enforcing any order as to costs which the county court may make, viz., either under sec. 883 or under sec. 870; but in any case by imprisonment in default of distress, whether the mode of enforcing comes under sec. 883 or sec. 870, or under some other provision of the Code.

Sec. 885 gives a further alternative remedy where the conviction is affirmed, viz., distress or commitment, as if no appeal had been brought. That, I take it, would be limited to a case where no costs were awarded by the county court. I say so because it is the conviction made in the first instance by the justices which is to be enforced "as if no appeal had been brought," and that I take it would mean a conviction in respect to which no change or addition had been made as to costs or otherwise by the county court.

Secs. 897 and 898 may have been intended to apply specially to cases where costs only are awarded on appeal. But if these cannot be made part of the conviction so as to be enforceable under it I would suppose that it was intended they should be enforced under these sections, and if so, if not paid, imprisonment would follow to enforce them. In another aspect it is quite possible, under the large words of sec. 883, that they might be added to the order, judgment or conviction made on appeal, even where it affirmed the conviction or order under appeal.

This much, however, is clear to me that Parliament did not intend to make any distinction between penalty and costs so far as the method of enforcement is concerned.

While we should be careful to see that the county court possesses power to enforce these costs in the manner expressed here, we must, on the other hand, be equally careful that we do not make a distinction where Parliament intended none, and the consequence of which would be more expensive and burdensome to the defendant.

Imprisonment for at least 30 days may be imposed for these costs. If they are to be enforced by process distinct from the conviction, for example under secs. 897 and 898, a serious question arises whether the penalty in that view might not be enforced by one period of imprisonment and the costs by another, while if enforced by one and the same process and at the same time, only one period of imprisonment would be endured.

I can, therefore, see no good reason for making the distinction contended for either in respect to the power of the county court, or the method of enforcement, and the more so as I find language in the statute amply sufficient to justify what was done in this instance.

It has been said that it would be unjust to punish a man with imprisonment for appealing. This, I suppose,

was rested upon the theory that it was no crime to appeal. Equally so may it be said that it is no crime to lay an information, or make a complaint, but yet the one who takes that step and fails, and costs are awarded against him, is liable to be imprisoned if he fails to pay the costs; all of which goes to shew, as I have said, that the imprisonment is not so much punishment for any crime, nor for merely appealing, but a method of enforcing payment of the costs.

MCDONALD, C.J., concurred.

TOWNSHEND, J.—

The whole question raised on this appeal is whether the county court Judge was justified in including the costs of appeal—that is to say, the costs incurred in the county court—in “the conviction.” I think sec. 883 of the Code is sufficient to justify the Judge’s decision which provides that he may

“Confirm, reverse, or modify the decision of said justice, or may make such other conviction, etc., etc., in the matter as the court thinks just, and may by such order exercise any power which the justice, whose decision is appealed from, might have exercised, etc., etc.”

“The court may also make such order as to costs to be paid by either party as it thinks fit.” It is to be observed that the portion of this section referring to costs is separate from that specifying the power and effect of the conviction. It empowers the court specially to make such order as to the costs to be paid as it thinks fit. I think this disposes at once of the argument that the Judge could not include costs of appeal in the conviction. The words of the section are ample to cover these costs.



For this reason I am of opinion this appeal should be dismissed with costs.

HENRY, J.—

The conviction was made by the county court Judge for District No. 6, upon an appeal by the inspector—informant—from an order of two justices dismissing a summons which charged the defendant with having sold intoxicating liquors at retail, without license, in violation of the Canada Temperance Act. It recites that the court adjudged and ordered that the order below should be set aside, and that the defendant be convicted to pay a penalty of fifty dollars and the costs of appeal, to be taxed forthwith and recovered by distress, and in default, thirty days imprisonment unless sooner paid, with costs of distress and conveyance to gaol. The conviction then, after setting out the adjudication as to the fine, proceeded as follows :

“ And also to pay said James R. McDonald the sum of \$27.16 for his costs in this behalf taxed and allowed, and if the said several sums are not paid forthwith it is ordered that the same be levied by distress and sale of the goods and chattels of said Samuel Hawbolt, the respondent, and in default of sufficient distress it is adjudged that said Samuel Hawbolt, the respondent, be imprisoned in the common gaol of said county of Guysborough, at Guysborough, in said county of Guysborough, for a term of thirty days, unless the said several sums and all costs and charges of said distress and commitment and conveying of said Samuel Hawbolt, the respondent, to said gaol, are sooner paid.”

This amount, \$27.16, is for the informant's costs of his appeal to the county court. Counsel for the defendant

contended that the county court had no power or jurisdiction to include in the penalty imposed the amount of the costs of the appeal to that court.

Sec. 872 of the Code (omitting the irrelevant parts) provides that wherever a conviction adjudges a pecuniary penalty, the justice, by his conviction or order, after adjudging payment of such penalty, with or without costs, may order and adjudge that, in default of payment thereof forthwith such penalty shall be levied by distress and sale of the goods of the defendant; and, if sufficient distress cannot be found, that the defendant be imprisoned, unless such penalty and costs, if the conviction or order is made with costs, are sooner paid.

Sec. 880, amongst other provisions, enacts that the court to which the appeal is made shall hear and determine it, and make such order therein with or without costs to either party, including costs of the court below, as seems meet to the court, and in case of the dismissal of an appeal by the defendant, and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

Sec. 883 was relied upon by counsel for the prosecution. It seems clear to me, however, that this section is not applicable to the present case. It is expressly applicable only to cases where the defendant is the appellant.

Now it is first to be noted that, according to sec. 872, the punishment, so far as costs is concerned, is that the defendant may, in addition to the amount of the prescribed penalty, be condemned to pay the costs of the prosecution before the justice or justices. In other words, the penalty may include these costs.

Sec. 880, sub-sec. (e), empowers the appeal court to

make an order "with or without costs to either party, including costs of the court below," but it falls short of enacting that the costs of appeal may be added to the penalty. This view is strengthened by the part of this sub-section which deals with the case of the dismissal of an appeal by the defendant, and which provides that the court "shall order and adjudge the appellant to be punished according to the conviction . . . and to pay such costs as are awarded" (by the appeal court). Applying this provision to a case where the penalty below includes costs, it is clear that it does not empower the appeal court to add the costs of the appeal to the penalty, because, if that were done, the appellant would not be "punished according to the conviction," but condemned to a more severe punishment. That being so it is impossible to construe the sections in question as intended to empower the appeal court to add the costs of the appeal to a penalty adjudged by that court in a case in which the summons has been dismissed in the court appealed from. The appeal court has, by the same sub-section, power, by its own process, to enforce its order for the costs of the appeal.

Even if sec. 883 should be considered applicable, the words "may confirm, reverse, or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may, by such order, exercise any power which the justice whose decision is appealed from, might have exercised, and such conviction or order shall have the same effect, and may be enforced in the same manner as if it had been made by such justice," would not give the appeal court jurisdiction or power to subject the defendant to a greater punishment than could have been adjudged against him if there had been a conviction below. On the contrary these words expressly limit the appeal court to the punishment which

might have been awarded by the court appealed from. Moreover, reason and justice are manifestly against condemning a person accused of a criminal offence to a greater punishment on appeal, as a consequence of his having been acquitted below, then he would have suffered if he had been convicted below. The offence cannot have become greater because the justice who tried the case held that it was not proved. That any court of review should have power to award more punishment for an offence than could be imposed by the court appealed from would obviously involve a violation of a fundamental principle of appeals. The accused should not be liable to additional punishment as a consequence of exercising his right of appeal, certainly not in a case where he has been acquitted below, and I can find nothing in the Act to warrant a result so illogical and unjust.

RITCHIE, J., concurred.

*Conviction affirmed.*

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, SCOTT AND WETMORE, JJ.

**CRAGG v. LAMARSH.**

*Appeal from summary conviction—Notice of appeal—Irregularity—Notice not addressed—Recognizance on appeal—Want of affidavit of justification by sureties—Cr. Code 880—Code Form NNN.*

1. A notice of appeal from a summary conviction is invalid if not addressed to any person.
2. It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given.

ARGUED: June 7, 1898.

DECIDED: June 14, 1898.

Appeal from a summary conviction. The notice of appeal was not addressed to any person, and there was no affidavit of justification by the sureties upon the recognizance.

*Bennett*, for respondent.

No one contra.

REGINA, N.W.T., June 14, 1898.

WETMORE, J.—

I am of opinion that the notice of appeal not having been addressed to any person was insufficient to give jurisdiction and that the learned judge should be so advised. *Ex parte Doherty*, 25 N.B.R. 38, and *The Queen v. The Justices of Essex*, [1892] 1 Q.B. 490, were cited as tending to establish that the notice in this case was sufficient. In *Ex parte Doherty* the notice was addressed to some person, namely, the justice who heard

the complaint, and the question was whether that was sufficient, whether the notice should not have been addressed to the complainant or to the justice for the complainant. The court held that the notice was sufficient. This court, however, held the contrary in *Keohan v. Cook*, 1 N.W.T. Rep. No. 1, p. 54.

By virtue of sec. 880, paragraph (b) of "The Criminal Code, 1892," every right of appeal shall be *subject to the following conditions*, namely, that "the appellant shall give to the respondent or to the justice who tried the case for him, a notice in writing in the form NNN" in the schedule within the time therein provided. The Form "NNN" provides in substance that this notice shall be addressed to the parties to whom the notice of appeal is required to be given. As before stated, the section referred to requires that it shall be given to the complainant, or to the justice who tried the case, for him. It seems to me, therefore, clear that it must be addressed to some person.

The statute under which *The Queen v. The Justices of Essex*, [1892] 1 Q.B. 490, was decided, "The Summary Jurisdiction Act, 1879," Imperial Act 42 and 43 Vict. ch. 49, sec. 31, does not provide as sec. 880 of "The Criminal Code, 1892," does that the notice shall be in a prescribed form. It merely prescribes that "the appellant shall . . . give notice of appeal by serving on the other party and on the clerk of the . . . court of summary jurisdiction, notice in writing of the intention to appeal." The notice in that case was not only served on the clerk, but it was addressed to him. The contention was that it ought to have been addressed to the convicting justices. The court held that it would put too narrow a construction on the statutory direction to so hold.

If, however, the statute had prescribed a form of notice

and directed that notice in that form should be given I am of opinion that the court would have had to follow such direction. Sub-sec. 44 of sec. 7 of "The Interpretation Act" (R.S.C. 1886, ch. 1) provides that "Whatever forms are prescribed slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them." It is not a slight deviation when the Act gives a form of notice and directs that it shall be addressed to certain persons to issue a notice not addressed to any person. One of the expressed conditions therefore, to which the right to entertain the appeal is made subject by the Code, not having been complied with, the learned judge had no jurisdiction to entertain it.

I am of opinion, however, that it is not a condition precedent to the right of appeal that an affidavit of justification by the sureties to the recognizance should accompany the recognizance. Such a practice has never prevailed. I never knew or heard of its being done. If it had been necessary it would have been so decided long since.

The requirement that in appeals of this character the appellant shall enter into recognizance with sufficient sureties has been in force in Canada at any rate since 1869, and it has always been assumed that the question of the sufficiency of sureties is a matter entirely for the justice before whom the recognizance is entered into. I say that this has always been assumed because I cannot find anything to the contrary. It is too late now, I think, to lay down a different rule. Moreover, under sec. 880, sub-sec. (c) of the Code, the party appellant has in this connection to do one of two things in order to give jurisdiction to the appellate tribunal. He has either to enter into a recognizance with two sufficient sureties conditioned as in the sub-section is provided, or deposit a sum of money. If he

is in custody and gives the required recognizance the justice must liberate him. In that case the justice must be the sole judge of the sufficiency of the sureties, the appellate court is not in a position to judge of it. But the same recognizance is the one filed as the condition precedent to the appeal. Parliament surely never contemplated that such recognizance should be sufficient for one purpose, namely, to authorize the liberation of the person in custody and not sufficient to give the appellate court jurisdiction. This question is quite different from that which arose in *Regina v. Richardson*, 17 Ont. Rep. 729, and *Regina v. Petrie*, 1 N.W.T. Rep., No. 2, p. 3. In those cases the statute and rule of court *prohibited* the court from entertaining a motion to quash a conviction unless the defendant was *shewn* to have entered into a recognizance with one or more sufficient sureties. That was held to be a provision that there must be affirmative evidence before the court in which the motion was made *showing* the sufficiency of the sureties before the motion could be entertained. The learned judge should be advised that an affidavit of justification of sureties need not accompany the recognizance.

We have no jurisdiction to award costs.

RICHARDSON, J. and ROULEAU, J., concurred.

SCOTT, J. (dissenting).—

I agree with the view expressed by my brother Wetmore that it is not incumbent upon the appellant to shew the sufficiency of the sureties to the recognizance and with his reasons for arriving at that conclusion. I cannot, however, accede to the view expressed by him that the notice of appeal is insufficient by reason of the fact that it is not addressed to any person.



It is true that the form of notice which appears in the schedule to "The Criminal Code" (Form NNN) appears to contemplate that it shall be addressed to some person or persons, but I think it will be conceded that such address would be unnecessary if it were served upon the person for whom it is intended, viz., the prosecutor.

The object of the notice is attained when it gives the person on whom it is served the necessary information as to what is intended to be attained by it; and, when served upon the convicting justice, even though not addressed to any person, if its form be such that it fully acquaints him with the fact that the appellant intends to appeal against a certain conviction, which is described with such particularity as to enable the justice to ascertain without any possibility of a doubt what conviction is referred to and who the prosecutor is, it is reasonable to presume that the justice must know the object of the notice, and that it is intended not for him but for the prosecutor, and knowing this, it would be just as much his duty to inform the prosecutor of it as if it were addressed to him.

For these reasons I am of opinion that the absence of any address is, to adopt the language of sub-sec. 44, sec. 7, ch. 1, Revised Statutes of Canada, "but a slight deviation from the prescribed form, and one which does not affect the substance and is not calculated to mislead."

I think that if this view were accepted, the object of the statute would be better attained than if the decision of this court in *Keohan v. Cook*, 1 N.W.T. Rep. No. 1, p. 54, were extended to cases like the present.

To my mind the form of notice in the schedule is such that it would be difficult for a layman to determine whether it should be addressed to the prosecutor or to the justice or both, because by using the word "you" when referring to the justice, it appears to contemplate that

under some circumstances at least it is intended to be addressed to him alone or to him and the prosecutor. It would be unreasonable that in every case where the appellant desires to appeal he should be compelled to employ an advocate to draw up the notice of the appeal, and owing to the difficulty I have mentioned in determining in what manner the notice should be addressed, even the advocate might err in preparing it.

*Appeal quashed.*

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON, J., AND MEREDITH, J.

**THE QUEEN v. HAMILTON.**

*Attempt—Verdict for, on evidence of principal offence—Abortion and attempted abortion—Evidence—Leave to appeal—Cr. Code, secs. 272, 528, 744, 746.*

1. Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence.
2. It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony and to disbelieve the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence.

DECIDED: October 6, 1897.

The defendants had been indicted at Toronto for abortion and for an attempt to commit abortion, and the jury had found a verdict of guilty of the attempt only.

There was, however, no evidence of an attempt other than the evidence in respect of the greater offence, which evidence, if believed by the jury, was sufficient to support a conviction for abortion.

The defendants obtained a fiat under sec. 744 of the Criminal Code from the Attorney-General granting his leave to appeal to the Court for leave to appeal from the conviction, and now applied for leave to appeal.

*Osler, Q.C., and W. D. McPherson*, for the defendants: There was no evidence to support a conviction for the lesser offence, apart from the evidence shewing the greater offence. The jury disbelieved this evidence as is shewn by their acquittal of the accused on the charge of abortion. There being no other evidence the defendants should be discharged, or there should be a new trial.

The Attorney-General did not oppose the application.

TORONTO, October 6, 1897.

THE COURT held that, as there was evidence to shew the commission of the abortion, the jury might believe a portion of it and disbelieve a portion of it, and that the discrediting of testimony in so far as it went beyond the lesser offence did not affect the validity of the jury's finding of guilt in respect of the lesser offence from the testimony of the same witnesses.

*Leave to appeal refused.*

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

## THE KING v. ROBERTS.

*Being inmate of house of ill-fame—Punishment—Summary trial without consent—Alternative procedure by summary conviction—Difference in penalty authorized—Vagrancy—Cr. Code ss. 207 (j), 208, 783 (f), 788.*

1. A prosecution before a magistrate for the offence of being an inmate of a house of ill-fame is none the less a "summary trial" proceeding, although the magistrate's jurisdiction is absolute and is exercisable without the consent of the accused.
2. The extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under part LV. of the Criminal Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, \$100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded \$50 in addition to six months' imprisonment.

ARGUED: February 14, 1901.

DECIDED: February 15, 1901.

MOTION on the return of a summons therefor for a writ of habeas corpus or for the discharge of the prisoner under Crown Rule 156 without waiting for the return of the writ.

The facts in connection with the case are set out in the judgment of RITCHIE, J.

*F. H. Bell*, for the prisoner.

*John J. Power*, for the prosecutor.

HALIFAX, February 15, 1901.

RITCHIE, J.—

The said Lena Roberts was, on the 12th day of February instant, convicted before the Stipendiary Magistrate

of the City of Halifax of being an inmate of a house of ill-fame in the City of Halifax and sentenced to imprisonment with hard labour for one day and to forfeit and pay the sum of \$60, and, in default of payment, to a further imprisonment for six months unless the said sum be sooner paid. She was arrested and imprisoned under a warrant issued on said conviction, and an application is now made to me for a writ of habeas corpus to test the legality of her imprisonment, a summons having been issued therefor under the provisions of the Crown Rules. This motion is opposed by Mr. Power acting on behalf of the prosecutor, and the record and proceedings before the Stipendiary Magistrate have been removed into this court by writ of certiorari.

On examination of the record returned, I am satisfied that the conviction in question was made under part LV. of the Criminal Code and the trial was a summary trial of an indictable offence and not a summary conviction. This was practically conceded by Mr. Power at the argument.

The jurisdiction is given by section 783 (*f*) of the Code, which provides, among other things, that whenever any person is charged before a magistrate with keeping or being an *inmate* or habitual frequenter of any disorderly house, house of ill-fame or bawdy house, the magistrate may, subject to the provisions thereafter made, hear and determine the charge in a summary way. The section following makes the jurisdiction of the magistrate absolute in respect of this particular offence and independent of the consent of the person charged. Section 788 fixes the punishment which the magistrate on summary trial of indictable offences may inflict upon the persons convicted in respect of all the crimes mentioned in section 783, except theft or attempt to commit theft the punishment for which is provided by section 787. The punishment for

the numerous offences mentioned in section 783 which the magistrate is authorized to inflict is not as severe as the punishment provided in the previous sections of the Code for those committing similar offences if the trial takes place in the Supreme Court, with one exception, and that is the offence of being an inmate of a house of ill-fame.

The only other sections of the Code cited to me, or which I can find, under which this offence is also punishable, are sections 207 and 208 relating to "Vagrancy"; the proceeding therein provided is by summary conviction, and the fine or penalty much smaller than that mentioned in section 788.

Counsel for the prisoner contends that the punishment awarded is in excess of that authorized by the Code, which should be limited so far as relates to that offence to that prescribed by section 208, the intention of the legislature being to make the punishments lighter when the offence is tried summarily before a magistrate than it would be if tried in the ordinary way. I cannot, however, take that view. Section 207 makes an inmate of a house of ill-fame a vagrant, and section 208 provides the punishment for vagrants on summary conviction. Section 207 makes a good many other offenders "vagrants," for which the Code has provided other and more severe punishment; for instance, those mentioned in sub-sections (b), (c), (f), (g), and (h) of section 207. It could not, I think, be successfully contended that because those persons were classed as vagrants they could be only punishable on summary conviction as "vagrants" and not under any other section of the Code authorizing more severe punishments for the offences of which they had been guilty and on account of which they were classed as "vagrants."

In my opinion the jurisdiction of the magistrate to try the offence charged under part LV. of the Code and to

inflict the punishment he has awarded is quite clear, and no ground has been shewn for the discharge of the prisoner. The motion will be refused: there will be no costs to either party.

*Discharge refused.*

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE, AND STREET, JJ.

**THE QUEEN v. URQUHART.**

*Summary conviction—Finding on question of fact—No review on certiorari—Remedy by appeal—Sunday observance—Sales by druggist—Lord's Day Act (Ont.), R.S.O. ch. 246.*

1. The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon certiorari, and the same can be attacked only by way of appeal from the conviction.

DECIDED: December 11, 1899.

Motion on behalf of defendant for leave to file the return to a certiorari, and for a rule nisi to quash a conviction of the defendant by the police magistrate for the city of Toronto for an offence against the Lord's Day Act of Ontario, R.S.O. 1897, ch. 246.

The conviction was that "William J. Urquhart, being a tradesman carrying on business at the said city of Toronto, on the 25th day of June, 1899, being the Lord's Day, at the city of Toronto aforesaid, at his shop, number 395 Yonge Street, in the said city, unlawfully did sell and publicly shew forth and expose and offer for sale certain goods and chattels, and other personal property, thereby doing and exercising the worldly labour, business, and work of his ordinary calling, by selling, amongst other

goods, two glasses of ice cream soda (the same not being the conveying of travellers or Her Majesty's mail by land or by water, nor the selling of drugs and medicines, nor other works of necessity nor works of charity) contrary to the form of the statute in such case made and provided."

The defendant was adjudged to pay a fine of \$1 and \$2.35 for costs.

The evidence before the magistrate shewed that the defendant was a chemist and druggist, and that on Sunday, the 25th June, 1899, two policemen bought "ice cream soda" at the defendant's drug store and paid twenty cents therefor. One of the policemen swore that he was not ill and did not get the stuff for medicine, but he also said that nothing was said at the time as to whether either he or the other policeman was ill or not. Evidence was given by physicians to shew that both ice cream and soda water were used as medicines. The magistrate found upon the evidence that soda water and ice cream are sometimes sold as medicines, and stated that, in his opinion, the sale of these articles mentioned in the evidence was not made as a sale of medicine, although nothing was said by either party on the subject.

TORONTO, December 11, 1899.

*W. Nesbitt*, Q.C., for the defendant: The conviction is bad, because the magistrate has expressly stated that the articles were sometimes sold as medicines, and that there was no evidence that they were not so sold in this case—the result of which was that there was no evidence to support the finding that there was not a sale of drugs or medicines within the exception in the statute. In *R. v. Howarth* (1873), 33 U.C.Q.B. 537, the defendant, a druggist, was convicted of a violation of the Lord's Day Act in selling peppermint lozenges at his shop on Sunday, and



the Court of Queen's Bench held that the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by the Court, and on review quashed the conviction.

THE COURT refused the motion, and stated that *Reg. v. Howarth*, 33 U.C.R. 537, had not been followed by it for many years, during which time it had been frequently laid down, and was thoroughly well established, that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed by the Court upon certiorari, but the defendant's remedy, if any, was by appeal.

*Rule refused.*

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## [COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

BEFORE SIR A. LACOSTE, C.J., BOSSÉ, HALL, WÜRTELE AND  
OUIMET, JJ.

## THE KING v. TREPANIER.

*Reserved case—Question of law arising before the trial—'Speedy' trial procedure—Charge not founded on depositions at preliminary enquiry—Reserved case not heard till after conviction—Stealing post-letter—Decoy letter—Post Office Act, Can., 52 Vict. ch. 20, sec. 2 (1)—Cr. Code, sec. 326 (c), 742, 744.*

1. A reserved case upon an objection taken before pleading, that the charge, upon which the accused was arraigned for a "speedy trial," was not founded upon the evidence adduced at the preliminary enquiry should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction.

QUEBEC, February 7, 1901.

The judgment of the court was delivered by

WÜRTELE, J.—

Wilfrid Trepanier, a letter-carrier employed in the city of Quebec by the Post Office Department, was charged with having stolen a post-letter containing money to the amount of \$4.50, purporting to have been written by one P. Marcotte, and to have been mailed at Malbaie, and addressed to an hotelkeeper in Quebec, named Gaspard Germain. He was arrested on that charge, and after a preliminary enquiry he was committed for trial by His Honour Judge Chauveau, one of the judges of the Sessions of the Peace for the city of Quebec. Subsequently he was brought before the same judge of the Sessions of the Peace, under the provisions of Part LIV. of the Criminal Code, and he consented to be tried by him without a jury.

Upon the arraignment of the accused and before he

had pleaded to the charge, his counsel raised a question of law and applied to the judge to reserve it for the opinion of the Court of Appeal.

This question of law is to the following effect: "The charge laid against the accused is not founded upon the evidence adduced at the preliminary enquiry, inasmuch as the proof taken at such preliminary enquiry does not shew that the document stolen was a post-letter which had been deposited in the post office under the provisions of the amendment to the Post Office Act, 52 Vict. ch. 20, sec. 2, sub-sec. 1, or of sec. 326 (c) of the Criminal Code."

The trial did not take place, and consequently no evidence was taken, but the judge gave no ruling on the question of law raised, and reserved it for the opinion of this court.

He states in the Case that it appears from the depositions taken at the preliminary enquiry that letters containing money had disappeared, that the accused was suspected of having stolen them, that in order to test him a fictitious letter was prepared, that marked money was enclosed in it and that it was deposited in the post office and placed with the mail matter which the accused had to deliver, that the letter was not delivered, and that one of the marked bank notes was found in his possession on the same day, and that the letter was a decoy letter.

The judge transmits with the case the depositions taken at the preliminary enquiry, and he asks this court to inform him if, under the circumstances mentioned in the case and under the facts disclosed in the depositions, the letter in question can be considered to be a post-letter under the provisions of the Act, 52 Vict. ch. 20, sec. 2, sub-sec. 1.

When the case was called the Crown Prosecutor raised a preliminary objection: that, as there had been no

ruling on the point of law, nor conviction nor judgment, no appeal could be taken to this court by way of a reserved case.

The right of an accused person to appeal in criminal cases to the Court of Appeal is granted by sec. 742 of the Criminal Code, which enacts that an appeal from the judgment of any court or judge having jurisdiction in criminal cases, on the trial of any person for an indictable offence, shall lie upon the application of such person, *if convicted*, to the Court of Appeal; but such appeal is restricted in the first place by sec. 743 to questions of law which are reserved by the judge and on which a case is stated by him for the opinion of the Court of Appeal, and in the next place by sec. 744 to questions of law which the judge has refused to reserve, but with respect to which the Court of Appeal grants leave to appeal and for which a case is then stated as if they had been reserved. In criminal cases, an accused person only has a right to appeal on questions of law, when an erroneous sentence has been passed on him.

If the judge who presided at the trial is unable to state and send up the case on the question of law which has been reserved or for which leave to appeal has been granted, any judge of the same Court may do so. Any question of law which has arisen on the trial or on any of the proceedings preliminary, subsequent or incidental to the trial, may be reserved either during or after the trial, and when a question is reserved during the trial, the case proceeds, and when a verdict of guilty is rendered or a conviction is pronounced, the judge prepares a case and moreover transmits it to the Court of Appeal.

There must have been a trial, an adverse ruling or judgment on a question of law, and a verdict of guilty or a conviction to give jurisdiction to the Court of Appeal,

and in point of fact, a verdict of guilty or a conviction is, under the provisions of sec. 742 of the Criminal Code, a condition precedent to the right of appeal, by an accused person from a ruling or judgment on a question of law.

The dictum of Lord Campbell in the case of *Regina v. Faderman*, 1 Denison 573, gives the reason why there must be a ruling or judgment on the question of law raised: "If judgment," he said, "has not been given, we have nothing to consider, for we only sit here to consider something which has been decided, not to give advice prior to a decision by some other tribunal."

Under the provisions of the Criminal Code, a reserved case cannot be had where there has been neither trial nor verdict of guilty, nor conviction; and when a question of law has been reserved during a trial and there is an acquittal, the reservation is no longer of any utility and lapses.

Prior to the enactment of the Criminal Code, appeals on questions of law arising at criminal trials were governed by sec. 57 of ch. 77 of the Consolidated Statutes of Lower Canada and by sec. 259 of ch. 174 of the Revised Statutes of Canada, which are identical in their terms, and they provided that when any person had been convicted of felony or misdemeanor, the court before which the case had been tried might reserve any question of law for the opinion of the Court of Appeal and should state a case for its consideration.

The provisions of these two statutes are similar to the provisions of the Criminal Code on the right of appeal on questions of law in criminal cases, and we can, therefore, refer to decisions rendered under their sway as authority in like cases arising under the Criminal Code.

On the 6th December, 1866, it was held by the Court of Queen's Bench at Montreal, in the case of *The Queen v.*

*Paxton*, 2 Lower Canada Law Journal 162, that there having been no conviction, no question of law could be reserved, and that the Court of Appeal had no jurisdiction. In this case the late Mr. Justice Mondelet remarked that there could be no reservation unless there had been a conviction, and that he remembered that Chief Justice Sir Louis H. Lafontaine had refused to hear a case which he had reserved before trial. On the same day the same decision was given in the case of *The Queen v. Dunlop*, in which a question of law had been reserved by Mr. Justice Drummond before trial. Then on the 14th October, 1879, it was held by the same court, at Montreal, in the case of *The Queen v. Lalanne*, 13 Legal News 16, that the defendant having been neither tried nor convicted, the Court of Appeal had no jurisdiction in the matter and that the question of law submitted should not have been reserved.

Our legislation respecting Crown Cases Reserved is borrowed from the Imperial Statute 11 & 12 Vict. ch. 78, which enacts, like ours, that when any person has been convicted, any question of law which may have arisen on the trial may be reserved.

Harris, in commenting on this statute (p. 451), says that a point may be reserved, provided, of course, that a conviction has taken place, for otherwise there is no need for further consideration; and Shirley, in his sketch of Criminal Law, p. 118, says: "If the judge thinks that the objection is one entitled to considerable weight and that his own opinion may possibly not be the correct one on the subject, he will, at the request of the prisoner's counsel, reserve the point and let the case go to the jury. If the jury then convict, sentence will be postponed till after the point of law has been decided. Of course, if the jury acquit on the merits, nothing more is heard of the point of law."

It is, therefore, clear that, in the present case, wherein a question of law has been reserved without adjudication and before trial and conviction, this court has no jurisdiction and that the case should not have been sent up.

We, consequently, order that the case reserved by His Honour Judge Chauveau, one of the judges of the Sessions of the Peace for the city of Quebec, while sitting as such at Quebec in a special session for the speedy trial of indictable offences under the provisions of Part LIV. of the Criminal Code, and referred to this court, be returned and remitted to the clerk of the peace for the district of Quebec, to the end that such further proceedings be had on the charge against the defendant Wilfrid Trepanier as to law and justice appertain.

*Case remitted.*

*James Dunbar, K.C., Crown prosecutor.*

*Jules A. Lane, for the defendant.*

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, MCGUIRE AND SCOTT, JJ.

THE QUEEN v. THOMPSON.

*Description of offence—Sufficiency of count—Perjury—Misdescription of tribunal before which committed—Reasonable information of the charge—Cr. Code, secs. 611, 723.*

1. A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury, and the act charged was sufficiently identified in the count, without mention of the jury, to cure the defect under Code sec. 611.

DECIDED: June 5, 1896.

The prisoner was charged before Wetmore, J., on the following and another count :—"That he had committed perjury on the inquest or inquiry before Andrew J. Rutledge, Esquire, one of Her Majesty's coroners in and for the North-West Territories, concerning," etc. The said inquest was held before the coroner and a jury, and on the preliminary investigation of the charge before a justice of the peace the prisoner admitted that he had lied when making a certain statement at the coroner's inquest. Upon the trial the evidence of the prisoner's admissions in his testimony before the justice was admitted and submitted to the jury. The prisoner was convicted and sentenced on both counts.

Objection was taken that as the inquest was held before the coroner and a jury, and not before the coroner alone, as charged, the prisoner was not guilty of perjury before the tribunal alleged in the charge. The following questions of law were reserved for the decision of the



Court en banc:—(1.) Should the inquisition offered in evidence have been received? (2.) Should the above count have been withdrawn from the jury, or they instructed to acquit the prisoner, on the ground that the inquest was before a coroner and jury, and not before a coroner, as charged. (3.) Whether the evidence of the prisoner's admissions in his testimony on the preliminary investigation of the charge ought to have been struck out or withdrawn from the jury's consideration.

*Gwillim*, for the Crown.

No one contra.

REGINA, N.W.T., June 5, 1896.

The judgment of the Court was delivered by

ROULEAU, J.—

The prisoner was charged on two counts, the first count being that he had committed perjury on the inquest or inquiry before Andrew J. Rutledge, Esquire, one of Her Majesty's coroners in and for the North-West Territories, concerning the death of one Sarah Jane Thompson, held at Moosomin, on the 30th day of October, 1895, by swearing that he was awake all night previous to his sister Sarah Jane Thompson's death, attending to a colt for a spavin, and did not sleep at all.

Objection was taken that inasmuch as the evidence taken was taken before the coroner and jury, and not only by the coroner, that the prisoner was not guilty of the perjury before the tribunal he actually gave his evidence. I think that sec. 611 of the Criminal Code, sub-secs. 3 and 4, dispose of this objection, because the words of the indictment were "sufficient to give the accused notice of

the offence with which he was charged." The circumstance that the evidence was given before a coroner and jury, instead of before the coroner alone, does not alter the fact that false swearing before the coroner or before the coroner and jury, would have been a perjury. Besides, sub.-sec. 4 referred to is very explicit: "Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to, provided that the absence or insufficiency of such details shall not vitiate the count." Moreover, by sec. 723 of the Criminal Code it was then open to the Court before which the case was tried to amend that count if of opinion that the accused had been misled or prejudiced in his defence. Surely in this instance the prisoner was furnished with reasonable information not to be deceived as to the offence he had committed, and I am of the opinion that the inquisition offered in evidence should have been received by the learned Judge. And for the same reasons I am also of opinion that the first count of the charge should not have been withdrawn from the jury, or the jury instructed to acquit the prisoner on that count on the ground that the alleged inquest or inquiry was proved to have been held before the coroner and a jury, instead of before a coroner as charged.

The third objection is based on the fact that the perjury is alleged to have been committed before the coroner, and the prisoner's admission in his testimony before Mr. McDonnell, J.P., was given in evidence, because he stated then that it was a lie when he swore before the coroner on the 30th October that he was awake all night previous to his sister's death attending to a colt that was spavined and did not sleep at all. Section 5 of the Canada Evidence

Act of 1893 reads as follows: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or any other person. Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence." In *Regina v. Sloggett*, 3 Dears. Crown Cases 656, the prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the Commissioner to consider himself in custody. On a case reserved it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case, Jervis, C.J., observes, "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him."

Under our law a witness cannot refuse or object to answer any question, and it would be of no avail to him to object. Everybody is supposed to know the law, and knowing that, he is bound by the law to answer any question whether criminalizing him or not. A witness would be very foolish to claim a privilege which the law does not give him. He is deemed to know, also, that the same law protects him from using that answer by which he criminalizes himself in any prosecution. So I am of opinion that the witness need not object to answer in order to avail himself of this enactment of the law which says that no evidence so given shall be used or received in evi-

dence against such person in any criminal proceeding thereafter instituted against him, etc.

I am of opinion, therefore, that the evidence of the prisoner's admission in his testimony before Mr. McDonnell, J.P., ought to have been struck out or withdrawn from the consideration of the jury.

The result is that the prisoner is entitled to a new trial on the first count.

RICHARDSON, J., MCGUIRE, J., and SCOTT, J., concurred.

*New trial ordered.*

**Note.**—*Incriminating answers—Witness's objection to answer—Canada Evidence Act.*

That part of the above judgment dealing with the Canada Evidence Act is not summarized in the head-note as it deals with the law prior to the amendment of the Canada Evidence Act in 1898. A new section 5 was then substituted by virtue of which the witness must object to answer in order to avail himself of the statutory exemption in respect of the subsequent use of the evidence against him. 61 Vict. (Can.), 1898, c. 53, s. 1, 2 Can. Cr. Cas. 601, 602. See note in Vol. 1, Can. Cr. Cas. 397, and R. v. McLinshy, 2 Can. Cr. Cas. 416.

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## [COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

**Ex Parte ISAAC FEINBERG.**

*Extradition — Treaty with U.S.A. — Evidence on extradition inquiry — Foreign indictment inadmissible — Sufficiency of evidence to justify surrender — Probable cause to believe guilty — Rule as to reasonable doubt — Habeas corpus — Limitation of powers of review — Extradition Act, R.S.C. 1886, ch. 142, secs. 10, 11.*

1. In extradition proceedings the indictment of the accused in the foreign court is hearsay evidence only and is not admissible in evidence in the enquiry before the extradition commissioner.
2. On habeas corpus in respect of an extradition commitment for surrender to the foreign State, the court may revise the commissioner's decision on the question of whether or not there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to the sufficiency of the evidence to justify the committal.
3. To justify the committal of an accused person for trial or for extradition it is only necessary that the evidence should be such as gives rise to probable cause to believe him guilty, and it is not necessary that it should be sufficiently conclusive to authorize his conviction if unanswered.
4. Upon either a preliminary enquiry or an examination in extradition proceedings, any reasonable doubt must go in favour of committal and not in favour of discharge.

MONTREAL, February 12, 1901.

WÜRTELE, J.—

A complaint was laid before J. P. Cooke, K.C., a commissioner under the Extradition Act, on the 12th day of January last (1901) against the petitioner Isaac Feinberg, charging him with having, on or about the 20th day of December last, at the city of Philadelphia, in the State of Pennsylvania, stolen clothing belonging to one Joseph Goldsmith of the value of \$3,000, and alleging that there

was a warrant out for his arrest and that he was then in Montreal. On the 19th day of January last an amended complaint was laid before the commissioner, specifying the theft to have been one of two hundred and thirty-five coats, worth \$400, and of one hundred vests, worth \$100, and alleging that on the 7th day of January last, a warrant had been issued in the city of Philadelphia for the arrest of the petitioner Isaac Feinberg by Wm. S. Kochersperger, a magistrate of that city, for the theft of such clothing, giving the value, however, as \$300, that on the 14th day of January last, an indictment was found in the Court of Quarter Sessions of the Peace for the county of Philadelphia against the petitioner for the theft of the above mentioned number of coats and vests belonging to Joseph Goldsmith, trading under the style of Hexter Brothers, of the value of \$500, and that the petitioner was then in Montreal. The petitioner was arrested in Montreal and on the 19th day of January last the enquiry was commenced. The warrant of arrest, the complaint made by one Benjamin Bittan on which it was issued, an information taken before the court clerk of the Court of Quarter Sessions for the county of Philadelphia and made by Joseph Goldsmith on the 14th day of January last, a deposition also made on the last mentioned day by Joseph Goldsmith and sworn to before the court clerk, and the indictment were produced on the day on which the enquiry commenced, and on the same day the deposition of John Murray, a detective officer of the city of Philadelphia, was taken by the commissioner. Later on, on the 29th day of January last, the commissioner took down in writing the testimony of Joseph Goldsmith, the person who complains of the theft.

After having taken the statement of the accused, the commissioner being of opinion that the facts disclosed

afforded a sufficient presumption of guilt and such probability as were sufficient to justify his committal for trial, committed him on the last mentioned day to the common jail of the district of Montreal for surrender to the United States of America.

The accused has obtained a writ of habeas corpus, and he complains that the evidence adduced consists of documents that are insufficient; that the testimony of the complainant Joseph Goldsmith is mostly hearsay; that no extradition offence is disclosed by the evidence adduced before the commissioner; and he claims that the commitment is not justified by the evidence adduced, and that the proceedings are irregular, null and void.

I have to see under the writ of habeas corpus whether the commitment for surrender is regular and valid, or whether on the contrary the petitioner's objections are well founded.

By the Extradition Act, in the case of a fugitive who is accused of having committed an extradition crime, such evidence must be produced as will, according to the law of Canada, justify his committal for trial, but subject, however, to the provisions of the Act.

When a person is accused of having committed a crime in Canada, he is brought before a magistrate, who holds a preliminary enquiry, and examines the witnesses who are called before him. The magistrate does not try the accused; he hears the evidence adduced, and if he thinks, not that enough has been proved to declare him guilty, but that the evidence is at least sufficient to put him on his trial, he commits him for trial.

Evidence to justify commitment, and not conviction, is sufficient, and it is not necessary that it should amount to proof of the accused guilt and be sufficient on trial to sustain the charge. The evidence to justify the holding

of an accused for trial is only such as amounts to probable cause to believe him guilty. It is not necessary that it be sufficiently conclusive to authorize his conviction. To convict there must be evidence which leaves no reasonable doubt of guilt, but to commit only requires that the circumstances proved are sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is probably guilty of the offence with which he is charged. (1 Moore, pp. 520, 521, 522). The purport of the inquiry is merely to determine whether a case is made out to justify the holding of the accused to ultimately answer to an indictment on which he shall be finally tried upon the charge made against him and at which trial he will have the right to make a full defence. (1 Moore, p. 522).

In the same manner as at a preliminary enquiry, when an accused is arrested for extradition, the commissioner takes the evidence of the witness called, but in addition to that, under the provisions of section 10 of the Extradition Act, he can receive as evidence in proceedings for extradition depositions and statements taken in the foreign State, when such documents are duly authenticated, and he may even receive in evidence duly certified copies of such documents.

The two witnesses called and examined in this matter were duly sworn, and I find on examination that the documents produced were all duly authenticated. The evidence produced is, therefore, legal, with the exception of the indictment, as an indictment is not admissible as evidence to warrant commitment for surrender, as it does not amount to more than hearsay evidence, but depositions taken in writing in court for the enquiry by the Grand Jury are admissible. (1 Moore, p. 524). Such depositions are admissible whether taken in the presence or



absence of the accused, or whether taken in the particular charge or not. It is for the magistrate to give to them what weight he thinks proper. An information is also a deposition in the sense of the Extradition Act. (Clark upon Extradition, 3rd ed., p. 210; 1 Moore, p. 650; 18 L.C. Jurist, p. 200).

The evidence adduced before the commissioner, both oral and documentary, with the exception of the indictment, is therefore admissible and legal; and the petitioner's contention to the contrary cannot be sustained.

But the petitioner asserts that the evidence adduced before the commissioner does not support the charge nor justify the commitment for surrender, and that it is on the contrary wholly insufficient. To decide whether such is the case or not would involve an examination by me of the evidence, and if I should find it to be legal, would involve a revision by me of the commissioner's discretion and decision on the effect of the evidence.

Now what is my function with respect to the evidence in an extradition matter? I hold, under the weight of the authority of case law and of the text writers, that it is merely to see whether any legal evidence has been adduced, and not whether the evidence is sufficient to support the charge. Under the writ of habeas corpus, the judge has no power to enquire as to the guilt or innocence of the fugitive, but only as to the legality of his detention. As put by Mr. Justice Taschereau (Taschereau's Criminal Code, p. 866), "the question whether there is sufficient evidence to support the charge is a question for the commissioner; and whether there is any evidence is a question of law for the judge." In fact, the judge on habeas corpus cannot review the judgment of the commissioner upon the evidence to the effect that it shews criminality or even probable cause. Hawley, in his Treatise on Extradition,

at p. 37, writes : " The evidence produced must satisfy the magistrate who conducts the examination that it would justify commitment for trial if the offence had been committed here. This is partly a question of law and partly a question addressed to the sound discretion of the examining officer. The evidence may be purely circumstantial, but it is sufficient if it produces conviction. So far as it is a question of law, the commissioner's decision is subject to review ; so far as it is a question addressed to his legal discretion, his decision is final. A reviewing court will revise the commissioner's decision so far as to see whether there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to its sufficiency."

In this matter I am of opinion, and I hold that the evidence adduced was legal. The commissioner had before him evidence given by two sworn witnesses in his presence, and the information on which the warrant of arrest was issued, and two depositions taken in the Court of Quarter Sessions of the Peace for the County of Philadelphia, which shewed while rejecting all hearsay statements, that the accused had been in Joseph Goldsmith's employment until the 5th day of January last, that the coats and vests mentioned in the complaint had been stolen and were found shortly after the accused's departure partly in a pawnshop and partly in the house of a brother of the accused, and that the accused had fled to Montreal. This evidence is of a nature to raise a strong presumption that the fugitive committed the theft mentioned in the complaint. At a criminal trial the rule is for a jury to give the benefit of a reasonable doubt to the accused, but at a preliminary enquiry when there is a doubt in the case a contrary rule prevails, and it must go in favour of committal, not in favour of discharge ; (Shirley on Magisterial Law, p. 43)

and as under the Extradition Act only the same evidence must be produced as would justify committal for trial, this rule must also apply to the examination in extradition cases. On this evidence the commissioner's decision is that there is probable and sufficient cause to put the accused on his trial if the crime had been committed in Canada, and he consequently committed him for surrender. This decision is one which is altogether within the commissioner's legal discretion, and is one which I cannot review on habeas corpus as to its sufficiency.

The petitioner's contention that the judge on habeas corpus can revise and set aside the commissioner's decision as to the sufficiency of the evidence is therefore not supported by the weight of jurisprudence on the point.

There remains one more point, and it is that the evidence did not disclose an extradition crime ; but larceny or theft is an extradition crime, and the complaint, the information, the warrant of arrest, the depositions taken in the State of Pennsylvania and the oral evidence adduced here all disclose the commission of such an offence.

On the whole, I find that the proceedings and the committal of the fugitive for surrender to the United States of America were regular and legal. The writ of habeas corpus is, therefore quashed, and it is ordered that the prisoner be remanded for surrender, or until he may be discharged according to law.

*Prisoner remanded for surrender.*

[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]

BEFORE McDUGALL, Co. J., CHAIRMAN OF SESSIONS.

## THE QUEEN v. WHELAN.

*Practising medicine — Midwifery — Unregistered practitioner — Ontario Medical Act—Practising, meaning of—Necessity of proving more than a single act—Conviction must state the particulars—Uncertainty in conviction—Amendment—R.S.O. (1897) ch. 176, sec. 49.*

1. A conviction for illegally practising medicine must shew the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought.
2. The conviction must set out the particular acts of the accused which are held to constitute the illegal practising.
3. A conviction stating the offence as having been committed, between dates specified, by prescribing, etc., for "R. and others" will be set aside if the evidence discloses no offence as regards the attendance upon R.; and it cannot be sustained by proof of altogether separate offences shewn to have committed within the stated time as regards other persons.
4. The conviction cannot be amended, on an appeal in which no new evidence is taken, by inserting in lieu of the words "and others" the names of such other persons.

DECIDED : January 9, 1900.

The defendant, Polly Whelan, was convicted by the Police Magistrate of the City of Toronto as having illegally practised medicine for hire, gain, and hope of reward, "within the space of a year, between 24th October, 1898, and 24th October, 1899, by prescribing for, and attending and operating on Mrs. Rider and other women."

The defendant thereupon appealed against the conviction.

*DuVernet* for appellant. The information is void for uncertainty. It should set out the particulars of the further acts alleged to have taken place with others, which

go to make up the alleged "practising." There must be more than one act to constitute "practising medicine," and the several acts constituting the offence must be specified. *R. v. Somers* (1893), 24 Ont. R. 244. The prosecutor might have had the information amended by inserting the names of the other persons, but did not do so. The conviction is void for uncertainty by reason of the words "and others." *R. v. Spain*, 18 Ont. R. 385. Prescribing on one or two occasions would not suffice. *Apothecaries v. Nottingham* (1876), 34 L.T.N.S. 76; *Apothecaries v. Jones*, [1893] 1 Q.B. 89; *Re Horton*, 8 Q.B.D. 434; *Re Donnelly*, 20 U.C.C.P. 165.

*Curry* for respondent referred to *R. v. Howarth*, 1 Can. Cr. Cas. 14, 24 Ont. R. 561; *R. v. Coulson*, 1 Can. Cr. Cas. 114, 24 Ont. R. 246.

TORONTO, January 9, 1900.

McDOUGALL, Co. J.—

This is an appeal from a conviction made by George T. Denison, Esq., Police Magistrate for the City of Toronto, for alleged breach of the Medical Act. The defendant is charged in the information with practising, within a space of a year last past, to wit, on or about the 10th of August, 1899, midwifery, by "prescribing and attending and operating upon Mrs. W. J. Gainer, of the City of Toronto, and others," etc.

The witnesses produced at the hearing before the Police Magistrate were a Mrs. Rutledge who speaks of being attended by the defendant in her confinement and being nursed by her, for two weeks, for which services she was paid \$8. No date, month or year is fixed by the witnesses when these services were rendered. Mrs. Harrison swore that in February, 1899, she was attended

in her confinement by the defendant but paid defendant nothing for her services and promised her nothing. A Mr. Darby swore that he had called defendant in to attend his wife in confinement in August, 1899, and paid her \$8 for her services. This was the evidence taken before the magistrate on the 27th October. An adjournment of the hearing was made to the 3rd November. On that day a Mrs. Emily Rider was called who swore that the defendant attended on her in her confinement seven months prior to the date she gave her evidence; that the defendant performed all the necessary medical services, including severing the cord, etc., at the birth of her child. There is nothing in the evidence of Mrs. Rider to shew any payment or promise of payment to the defendant for her services. A witness named De Falco stated that the defendant attended his wife in confinement in July, 1899, and that he paid her \$5 for her services. In all these cases the witnesses swear that no medical man was present at the birth of each child of any of the women referred to. No person of the name of Gainer, the person mentioned in the information, was called and no amendment was made in the information by substituting the name of any one of the women called as witnesses.

The charge laid in the information is an alleged practising of midwifery on the 10th August, 1899, on Mrs. Gainer and others. The conviction against the defendant is for the practising of midwifery without registration for hire, gain and hope of reward, within the space of a year, between 24th October, 1898, and 24th October, 1899, by prescribing for, and attending and operating on Mrs. Rider and other women.

It was agreed by all parties who appeared before me at the hearing of the appeal that the case should be disposed of by me on the evidence contained in the depositions taken before the Police Magistrate.

The first objection taken to the conviction was that it does not conform to the information. The information alleges an offence against the Medical Act and gives the particular instance alleging the practising of midwifery for gain, hire and hope of reward upon a Mrs. Gainer and others. The conviction recites an offence against the Medical Act committed within a year, and gives the particular instance of practising midwifery upon a Mrs. Rider and other women within the year. It must be noticed first that a conviction purporting to be made for practising midwifery within a year from the date of the information for hire, gain and hope of reward by prescribing and attending and operating upon women in the City of Toronto, contrary, etc., although following the exact words of the Statute, would be bad. *Regina v. Spain*, 18 Ont. R. 385. The conviction must set out the particular act or acts by the defendant which constitute the practising. Now, what is practising?

In *Apothecaries v. Jones*, [1893] 1 Q.B. 93, Hawkins, J., thus defines it:—"To practise a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily or habitually . . . though it is true each individual act would afford cumulative evidence of practising, yet bare proof of one individual act would not of itself amount to a practising." *Apothecaries v. Jones* further decides that an offender can only be convicted of one offence who may have treated a number of patients on the one day, and that the prescribing different treatment to each individual would not constitute separate offences if all the acts occurred on the same day. *Crepps v. Durden*, 1 Smith's Leading Cases, 9th edition, page 62, is cited to support this view. "The same reasons," Mr. Justice Hawkins says, "guided the Court in *Crepps v. Durden*, namely, that the offence created by the Statute

can alone be made the subject of conviction—the overt acts done in the commission of that offence are so many pieces of evidence.” The learned Judge, however, adds this rider to some of the conclusions which might be attempted to be deduced from his general statement. “ I do not wish it to be understood that in cases arising under the Act now under consideration (Apothecaries Act), the fact that an uncertified person on two separate days prescribed and made up medicine for different persons would necessarily justify a conviction for a separate offence on each day, for it is not difficult to imagine cases in which acts of prescribing and making up medicines on several closely following days might, taken together, afford abundant evidence of practising. No such conclusion can fairly be drawn if the acts of each day had stood alone. Again, even though a patient be attended by a person clearly practising as an apothecary, it does not follow that because the attendance, prescription for and supply of medicine to such patient had extended over two whole days, or parts of two days, two offences must necessarily have been committed. Take the case of a patient to whom in a case of urgency an unqualified person had attended continuously, say, from 10 p.m. of one day to 10 a.m. on the following. Under such circumstances I should think only one offence would be committed, for all would be one continuous action.”

In the present case then, the particular act relied upon as shewing practising midwifery is stated to be that spoken of by the witness, Emily Rider. There is not the slightest evidence to shew that the defendant was paid anything by Mrs. Rider, or promised anything for her services. These services were rendered seven months before the date of the information, namely, in March, 1899, and the defendant attended the patient for two weeks. The other instances of alleged attendance by the defendant upon women (where



the witnesses fix any date, or speak of any payment to the defendant) were the cases of Mrs. Darby, who was attended in August, 1899, and \$8 paid, and Mrs. De Falco, who was attended in July, 1899, and \$5 paid; but neither of these particular cases is set out in the conviction, nor could either of them be set out because, occurring as they did at such different dates, and so remotely from the particular act relating to Mrs. Rider, they constituted in law, if an offence at all, separate offences. I am not prepared to say that the defendant might not properly be convicted for practising midwifery, in the case of Mrs. Rider, had the evidence shewn payment to her for her services. I am inclined to think that the two weeks continuous attendance, viewed in connection with what is shewn to have taken place at the birth of Mrs. Rider's child, and the entire absence of any lawful medical attendant, might possibly support a finding that this was not the mere exercise of a calling on an isolated occasion, but amounted to a practising within the meaning of the Medical Act. I am not prepared to hold, either, that if the particular acts set out in this conviction, relating to Mrs. Rider, were clearly shewn to be a prescribing for, and attending and operating for hire, gain, and hope of reward by the defendant, that the facts relating to the Darby and De Falco cases might not possibly be admitted as amounting to cumulative evidence of practising. It is, however, not free from doubt. The Crown must be taken to be proceeding for one offence only as committed within the year prior to the date of the information, and that offence is specified to consist of the acts done by the defendant in the case of Mrs. Rider. The addition of the words "and other women" does not meet the difficulty. The defendant cannot be convicted of an offence for her alleged service to Mrs. Rider, because there is no evidence of payment or reward to her in that case. Had the information

been amended by the insertion of Mrs. Rider's name in the place of Mrs. Gainer, it would not have improved matters. The failure to prove payment or reward to the defendant by Mrs. Rider would be equally fatal to a conviction based upon, and following such an amended information, and to attempt to validate the present conviction by inserting in the conviction Mrs. Darby's or Mrs. De Falco's name in the place of Mrs. Rider would be to do something far beyond anything sanctioned in decisions that I have been able to find.

I am of opinion, therefore, that the evidence does not support either the information as laid, or the conviction based thereon. I think the conviction ought to be quashed, but under all the circumstances of this case without costs.

*Conviction quashed.*

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## [SUPREME COURT OF CANADA.]

BEFORE THE RIGHT HON. SIR HENRY STRONG, CHIEF JUSTICE OF  
CANADA, AND TASCHEREAU, GWYNNE, SEDGEWICK,  
AND GIROUARD, JJ.

## BRAULT

V.

## ST. JEAN-BAPTISTE ASSOCIATION OF MONTREAL.

*Lotteries—Conspiracy to commit offence against criminal laws—Agreement to operate lottery—Collateral agreements—Civil action for enforcement—Judicial notice of illegality—Constitutional law—Lottery licensed by provincial authority—Ultra vires—Cr. Code sec. 205.*

1. Provincial legislatures have no power to authorize the running of lotteries.
2. No action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law.
3. Where in a civil action it appears that the plaintiff entered into a conspiracy with the defendant to commit an unlawful act and that the action is brought to recover money paid in furtherance of such conspiracy, it is the duty of the Court *ex mero motu* to notice the illegality, although not formally pleaded.
4. Such an illegality cannot be cured by the defendant's pleas or attempted waiver.
5. Where there are two agreements, both of which are in furtherance of the unlawful scheme, the second being in form a contract of loan but collateral and auxiliary to the first which provides for the operation of the lottery, both agreements are invalid and unenforceable.

ARGUED: May 12, 1900.

DECIDED: October 8, 1900.

Appeal by the defendant L'Association St. Jean-Baptiste de Montreal from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The respondent plaintiff (H. A. A. Brault) and his partner (whose interests he subsequently acquired), entered into a written agreement, in 1890, with the appellant for the operation of a lottery scheme authorized to be carried

on by the appellant under the provisions of a statute of the Legislature of Quebec (53rd Vict. ch. 36), and an order of the Lieutenant-Governor-in-Council, passed in conformity therewith, and deposited \$30,000 in a chartered bank as a continuing security for the operation of the lottery according to the terms of the agreement. The object of the scheme was to secure funds for the erection by the appellant of a national building, now known as the "Monument National," in Montreal, for the establishment of a public library and the organization of courses of lectures and practical instruction, in the edifice to be constructed upon lands belonging to the appellant. The lottery was carried on under the conditions stated in the agreement, and in 1892 another agreement was entered into by the same parties whereby the \$30,000, which had been so deposited, was to be utilized by the appellants to facilitate the continuation of the construction of the building, above referred to, which had already been commenced.

This second agreement referred to the agreement of 1890 and provided that, notwithstanding such use of the money, appellant would be deemed to continue to hold the same, and to be the depositary thereof, to secure the execution of the obligations undertaken in the first agreement. It also provided:—That if Brault should carry out the lottery operations during the whole term of the first agreement, appellants might apply the \$30,000 on account of the last of the annual payment due them under its conditions; that appellant might also (should occasion arise) apply all or any part of the said sum, in accordance with the provisions of agreement of 1890, to extinguish obligations towards appellant or holders of lottery tickets; that if the Government withdrew the permit appellant was to repay said \$30,000 or any part of it that might remain due in five years from the date of such revocation, or at

the end of the time when the agreement was to run in the event of such time being not more than five years from such revocation ; that so long as respondent should carry on the lottery operations, appellant was to pay them four per cent. interest on the \$30,000 ; that should he discontinue the lottery operations, appellant was thereafter to pay him five per cent. instead of four, and that each interest instalment was to bear interest from its due date till paid ; and, as security for the repayment of said deposit, appellant mortgaged certain property described in the deed. It was further provided that nothing in the second agreement should be construed as in derogation or novation of the conditions or obligations of the first agreement.

Subsequently, in 1892, the Government of Quebec revoked the permit by Order-in-Council, and conferred the right to hold the lottery on other persons for the benefit of the appellant, and the respondent brought his action for \$2,306.75, for instalments of interest at five per cent. on the deposit of \$30,000. The Superior Court maintained the plaintiff's action, and the present appeal is asserted from the judgment of the Court of Review affirming that decision.

OTTAWA, May 12, 1900.

*Fitzpatrick*, Q.C., (Solicitor-General), and *Béique*, Q.C., for the appellant : The action is an attempt to enforce a contract which appears from respondent's own declaration to be not only illegal, but an offence against the criminal law : arts. 989, 990, 1062 Civil Code of Quebec. The Quebec Act, 53 Vict. ch. 36, and the Orders-in-Council passed thereunder, cannot afford any justification. The holding of lotteries was made penal before Confederation, and these penal statutes remained in force till repealed or modified by Parliament: sec. 129 B.N.A. Act; *Dobie v.*

*Temporalities Board*, 7 App. Cas. 136. The Dominion Acts, since Confederation, have re-enacted and extended the old law, and any Quebec statute purporting to authorize a lottery such as that here in question, was an attempt to repeal or suspend the operation of legislation upon criminal law by the Parliament of Canada or its predecessors and therefore *ultra vires*.

The deeds of 1890 and 1892 cannot be separated from the rest of the subject matter and treated as distinct contracts. The covenants in the deeds have but one object, and form but one contract which, if illegal in one part, is wholly illegal. This constitutes absolute nullity which should be judicially noticed even in the absence of any plea to that effect. The principal covenants are null because they relate to operations opposed to public order and forbidden by the criminal law and the accessory obligations must be equally null: Dal. '63, 2, 113; Dal. Rep. vo. "Obligations," n. 5531; *McKibbin v. McCone*, Q.R. 16 S.C. 126. We refer also to *Cronyn v. Widder*, 16 U.C.Q.B. 356; *Ex parte Rousse*, Stu. K.B. 321; *Reg. v. Lawrence*, 43 U.C.Q.B. 164; *Pigeon v. Mainville*, 17 Legal News, 68; *Kearley v. Thomson*, 24 Q.B.D. 742; *Collins v. Blantern*, 1 Sm. L.C. (10th ed.) 355; *Dawson v. Ogden*, Cass. Dig. (2nd ed.) 797; Cass. Dal. '76, 1, 45; Pothier, "Nantissement" n. 6; 28 Laurent, nn. 426, 494, 495, 498; Guilouard "Depot" n. 65; *The Queen v. Lorrain*, 28 Ont. R. 123; Hawkins P.C. 733.

*Belcourt*, Q.C., for the respondent: The second agreement is separate and distinct from the agreement as to the operation of the lottery and is a mere contract of loan. The rate of interest is dependent on conditions mentioned, by reference, only as a matter of convenience.

The rate of five per cent. per annum prevails on account of the Order-in-Council having been made for the

cancellation of the permit according to the terms provided, in that event, by the agreement for the loan of the capital. The association, which procured the annulment of the permit and the substitution for other persons for respondent in the operation of the scheme, cannot be allowed to disregard the contract and retain the principal loaned without payment of any interest for the use of the money. These funds were not used for an illegal purpose, but for the erection of a national educational institution. The respondent would be, in any case, entitled to the legal rate of interest: art. 1785 C.C.

The Quebec Acts in question are police regulations, properly within the legislative jurisdiction of the Province, and caused no interference with Dominion Criminal Legislation at the time they were passed. The contracts are both anterior to the Criminal Code, 1892, and at their date the operation of such a lottery, under the control and permission of the provincial authorities, was not, in any sense, criminal, nor against good morals or public policy. Even, therefore, if the agreement for the loan be held to have been based upon any such consideration and that the contracts are co-relative, there cannot be any ground for nullity.

OTTAWA, October 8, 1900.

THE CHIEF JUSTICE.—

I concur in the judgment of Mr. Justice Taschereau.

TASCHEREAU, J.—

The respondent claims from the appellant by this action divers sums due to him, as he contends, in virtue of two deeds passed between them in 1890 and 1892 for the

carrying on of certain lottery operations in the Province of Quebec purported to have been authorised by a statute of the Provincial Legislature. Had the Provincial Legislature the power under the British North America Act to so authorise a lottery which was then made an offence by ch. 159 of the Revised Statutes of the Dominion, as it is now likewise by the Criminal Code? There is, in my opinion, no room whatever to doubt that the Legislature had no such power. The legislation in question was ultra vires and void, and an undue interference with the criminal law of the Dominion, over which the federal Legislature has exclusive authority under the Constitutional Act.

By the criminal law of England, as introduced in the Province of Quebec by the Royal Proclamation of 1763 and the Act 14 Geo. III. ch. 83, all lotteries were prohibited and punishable as public nuisances: 10 & 11 Wm. III. ch. 17; 8 Geo. I. ch. 2, sec. 36; and 12 Geo. II. ch. 28; *Ex parte Rousse*, Stu. K.B. 321; *Cronyn v. Widder*, 16 U.C.Q.B. 356. Under the French law previously in force in the Province, though this is immaterial, they were likewise illegal: 4 Brillion, Dict. des Arr. vo. "Lotterie"; Frère-Jouan du Saint, Jeu et Pari, n. 185. In 1856, the Legislature of the Province of Canada passed a statute (19 Vict. ch. 49; C.S.C. ch. 95), also prohibiting them under pain of penalties recoverable by summary conviction. That statute was in force as ch. 159 R.S.C. till it was superseded by sec. 205 of the Criminal Code. But the offence remained a misdemeanour as it previously was, and probably still continued to be an indictable one, as this statute did not create a new offence, though, whether it did or not, would not make any difference in this case: sec. 933 Criminal Code; 1 Russell on Crimes and Misdemeanours (6th ed.) 200 *et seq.*; *Rex v. Gregory*, 5 B. & Ad. 555; *Reg. v. Crawshaw*, Bell, C.C., 303; *Reg. v. Hall*, 17



Cox C.C. 278; [1891] 1 Q.B. 747; *Hamilton v. Massie*, 18 O.R. 585; Bishop Stat. Cr. 250 *et seq.* By altering the punishment the nature of the offence was not altered. If it was a misdemeanor previously, as it certainly was (Burbidge, Criminal Law, p. 181), it was not less a misdemeanor afterwards, which passed at Confederation under the exclusive control of the Federal Legislative authority. The Provincial Legislature, therefore, had not the power to authorise the lottery in question, and its legislation on the subject is null of a nullity *de non esse*.

The respondent, however, claims the right at common law to recover back from the appellants what he has paid or loaned to them or deposited with them, notwithstanding the illegality of his contract. But that is a matter which cannot be determined here. His action is upon a contract; that contract is illegal and void, and his action must consequently be dismissed: arts. 13, 14, 989, 990 Civil Code. He also in his factum invokes *res judicata*. But there is no such issue raised by the pleadings, could it affect the result of our decision upon the constitutional question.

His further contentions as to his good faith and the bad faith of the appellants are based upon a total misapprehension of the nature of the objection upon which his action must fail. Upon his own allegations, he has entered with the appellants into a conspiracy to commit an unlawful act. It is hardly necessary to say that courts of justice cannot sanction such dealings or give them any countenance whatsoever. It is, on the contrary, their duty to notice illegalities of this nature *ex officio*, and allow them to be suggested without any plea at any stage of the case. Nor could the illegality of the respondent's claim be waived or cured by his adversary's pleas or conduct. And the fact that he may have believed that the Quebec

Legislature had the power to authorise this lottery is, in law, no ground to support his action: sec. 14 Criminal Code.

“Les nullités de droit public, c’est à dire celles qui ont pour cause principale et première, l’intérêt de tous” (says Solon, 2 Nullités no. 345) ne se couvrent point par le consentement des parties directement intéressées à l’acte; en pareil cas la loi résiste continuellement, et par elle-même à l’acte qu’elle défend; elle le réduit à un pur fait qui ne peut être confirmé ni ratifié. *Privatorum conventio juri publico non deroget.*”

Compare *The Manufacturers Life Ins. Co. v. Anctil*, 28 Can. S.C.R. 103; [1899] A.C. 604.

“La loi qui interdit les loteries est une loi d’ordre public” (says Frèrejouan du Saint, Jeu et Pari, No. 211), et elle frappe d’une pénalité ceux qui y contreviennent. La nullité des conventions qui ont la loterie pour base est donc une nullité radicale et absolue que peuvent invoquer toutes les parties intéressées indistinctement. Le promoteur de l’opération lui-même peut se retrancher derrière la prohibition légale pour se dispenser d’exécuter ses engagements, car nul ne peut être contraint de violer une loi pénale, sous prétexte qu’il s’y est obligé par contrat.”

“La loi ne peut admettre” (says Bédarride, Dol et Fraude, Nos. 1291, 1295), que ce qui a pour objet d’éluder les préceptes de la morale, l’exigence des bonnes mœurs ou les dispositions d’ordre public puisse jamais produire aucun effet. Tout ce qui a été fait en sens contraire doit donc s’effacer et disparaître.”

Upon that principle, it was held in a case cited in Sirey, 69, 2, 53, that “les loteries étant prohibées par la loi française toutes conventions ou obligations relatives à leur organisation sont nulles comme ayant une cause

illicite et ne peuvent donner lieu à une action devant les tribunaux."

Other cases to the same effect are reported in Sirey, 67, 2, 86 ; 67, 2, 87 ; 65, 1, 77 ; 70, 1, 357 ; and Dalloz, 46, 2, 195.

In a Louisiana case, *Davis v. Caldwell, et al*, 2 Rob. (La.) 271, the plaintiff claimed from the defendant a certain sum as remuneration for services rendered by him in aid of their project to organise a lottery. But his action was dismissed on the ground that the contract sued upon being intimately connected with a speculation reprobated and forbidden by law could not be enforced in a Court of justice.

The respondent's attempt to separate the agreement of 1892 from that of 1890 cannot succeed. They are both in furtherance of an unlawful scheme, and the invalidity of the first vitiates the other collateral or auxiliary agreement springing from it: *Davis v. Holbrook*, 1 La. Ann. 178; *Fox v. New Orleans*, 12 La. Ann. 154; *Cummings v. Saux*, 30 La. Ann. 207; *Armstrong v. Toller*, 11 Wheaton, 258.

*Fisher v. Bridges*, 3 El. & B. 642, to which His Lordship the Chief Justice has called my attention, is a case in point.

Appeal allowed, and action dismissed. No costs in the three courts.

GWYNNE and SEDGEWICK, JJ., concurred in the reasons given by TASCHEREAU, J.

GIROUARD, J. (dissenting).—

We have not to enquire whether or not a contract prohibited by law can have any effect ; that point is formally settled by arts. 989 and 990 of the Civil Code. On the

other hand, it would not be sufficient to content ourselves with an inquiry as to whether lotteries are prohibited under the criminal laws of England. As a matter of fact, when, in 1774, the latter were introduced into Canada, lotteries were forbidden in England as crimes or misdemeanors. Since the end of the 17th century, the British Parliament has declared that all lotteries, which until then had been permitted by the common law, should be common and public nuisances, that is to say, indictable offences (10 & 11 Wm. III. ch. 17). This statute was still in force at the time of the passing of the Quebec Act, which introduced the criminal laws of England as part of the law of Canada: *Ex parte Rousse*, Stu. K.B. 321. This statute was subsequently modified in England by several Acts of Parliament (19 Geo. III. ch. 21; 22 Geo. III. ch. 47; 27 Geo. III. ch. 1; 42 Geo. III. ch. 57 and ch. 119, sec. 27; 46 Geo. III. ch. 148; 6 Geo. IV. ch. 60).

All these statutes continued to define lotteries as being public nuisances, and finally, by 46 Geo. III. ch. 148, the penalties imposed could not be demanded except in the name of the Attorney-General before the Court of Exchequer, instead of before ordinary justices of the peace: *Reg. v. Tuddenham*, 5 Jur. 871.

Our ancestors considered that these provisions were not suitable to a new country, and they mitigated their rigour considerably by several statutes passed as well before as since Confederation of the Provinces in 1867 (19 & 20 Vict. ch. 49; C.S.C. ch. 95; 23 Vict. ch. 36; 46 Vict. ch. 36; R.S.C. ch. 159; 32 Vict. ch. 36 (Que.); R.S.Q. Arts. 2911-2920; 53 Vict. ch. 36 (Que.). Not one of these statutes declared lotteries to be crimes or public nuisances; all of them prohibit lotteries, it is true, except in certain cases, but an offender incurs simply a fine of twenty dollars to be recovered in a summary manner

of any person brought before a mayor, or justice of the peace, one half of the fine to the prosecutor and the other half to the C.S.C. (1859), ch. 95, sec. 1. If the Canadian Legislature had been to make them have made use of the language of the law for the punishment of "betting and pool" it is declared that the offender shall be guilty of a misdemeanour and liable to fine and imprisonment. 159, sec. 9.

that, up to that time, the Canadian Legislature considered lotteries merely as being of a municipal character, that several exceptions were made in the first place in favour of bazaars for the poor approved by the municipal authority, and of art societies. The first time that lotteries were prohibited as crimes in Canada was when the Criminal Code of 1892 was brought into force, in the same time an end put to the jurisdiction of the provincial Legislatures, for the Parliament of Canada could not declare anything, even the most innovative matter, to be a crime. But in this case the acts which are attacked were signed before the coming into force of the Criminal Code, under the provincial law adopted with that precise effect. In 1890 the Legislature of Quebec passed a statute which permitted the operation of a lottery for the purpose of establishing any institution of public instruction, on the condition, however, that, if of a permanent character, the sanction of the Governor-in-Council should first be obtained. This was duly granted to the appellant on the 24th of September, 1890, modified on the 24th of September, 1890, and revoked on the 15th of October of the

The contention of the appellant is that the legislation of the Province of Quebec is *ultra vires*, because, it is said, before Confederation the laws concerning lotteries were part of the body of the criminal law of Canada, which, by the Confederation Act of 1867, became subject to the exclusive jurisdiction of the Parliament of Canada. I cannot accept the first part of this proposition. The law, prior to the Criminal Code, 1892, forbids lotteries, it is true, but not as a crime, either expressly or impliedly, by declaring, as did the Imperial Parliament and the Legislatures of almost all the States of the American Union, and also the Penal Code of France, that all lotteries were public nuisances or misdemeanours or *délits*: *Am. & Eng. Ency. of Law*, 1 ed., vo. "Lottery," p. 1172; Gilbert sur Sirey, *Code Pénal*, Arts. 410, 464, 475 and notes. They are simply prohibited and punishable in a summary manner in the same way as an infinity of other offences or breaches of regulations which are undoubtedly under provincial jurisdiction, for example, offences against municipal by-laws, against good order, public health and safety of the Province, respecting constables, bailiffs and public officers in the Province, and the laws relating to hunting and fishing, asylums for the insane, licenses, manufactures, mines, the practice of pharmacy, provincial and municipal elections, and so forth, which are always punishable in a summary manner before justices of the peace: *Reg. v. Wason*, 17 Ont. App. R. 221.

In my humble opinion the distinction between penal offences or simple contraventions and crimes or indictable offences presents itself as a condition of our federal system, and from this point of view the promulgation of our Criminal Code was no doubt a national benefit. Before the Code, the criminal law recognises three kinds of crimes, treason, felony and misdemeanour, but all were indictable.

Owing to this, the Code did not preserve the former distinction; to-day all crimes in Canada are indictable offences, even although a certain number may be prosecuted in a summary manner before justices of the peace. But, before the Code, lotteries were not indictable, and consequently, in view of the codifier, were not crimes. It was necessary to have a special enactment to render them criminal.

A great number of English precedents have been cited to establish that, under the common law, all infractions of laws of public order were misdemeanours. As many can be cited to the contrary effect. Chief Justice Harrison has carefully analysed them all in *Reg. v. Roddy*, 41 U.C.Q.B. 291. The learned Chief Justice concludes that they cannot possibly be reconciled. It must be admitted that the English jurisprudence upon this point is in a deplorable state of confusion which cannot be overcome save by codification of the criminal law.

The tendency of the more recent decisions is that the old definition of crime by Blackstone is too large, and that a crime "is more accurately characterised as a wrong, directly or indirectly affecting the public, to the commission of which the state has annexed certain punishments and penalties and which it prosecutes in its own name in what is called a criminal proceeding": *Am. & Eng. Encycl. of Law* (2nd ed.) 1898, vo. "Crime," pages 248 *et seq.*

One of the last commentators of Blackstone adds that a misdemeanour does not include "a multitude of unclassified offences of which inferior magistrates, such as justices of the peace, police magistrates and the like, have exclusive jurisdiction": Lewis on Blackstone, ed. 1897, pages 4 and 5, where a number of authorities are collected.

In *Attorney-General v. Radloff*, 10 Ex. 84, Baron Martin said: "There are many crimes properly so called

which are liable to be punished on summary conviction. But there are a vast number of acts which in no sense are crimes, which are also punishable; such for instance as keeping open public houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act, but the requirements of the public revenue, which induce the Legislature to impose a very high duty upon the article, probably render it a matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a 'crime,' according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of 'crime' is an indictable offence."

It is true that the opinion of Baron Martin did not prevail, the Judges being equally divided. But it was recently approved by the English Court of Appeal in the celebrated case of the *Attorney-General v. Bradlaugh*, 14 Q.B.D. 667. Lord Justice Brett said at page 688: "If I had been a member of the Court at that time I should have seen no answer to the reasoning of Martin, B., in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding."

At page 686 His Lordship also says: "It has been at different times during this argument contended before us on both sides, for different purposes, that the third section of the Parliamentary Oaths Act, 1866, imposes on every member a legal obligation to take and subscribe the oath,



and that if a member does not take and subscribe the oath in the manner therein set forth, an indictment will lie against him on that section alone as for a misdemeanour, and that the penalty in the fifth section is cumulative.

. . . . . Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member, without having taken the oath in the manner appointed, is that the member becomes liable to a penalty. If that be so, no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. The recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that the distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament, I should, on that ground alone, say that no crime is enacted by this Act."

The head-note dealing with this part of the judgment is as follows: "An information at the suit of the Attorney-General to recover penalties under sec. 5 of the Parliamentary Oaths Act, 1866, from a member of Parliament, for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a 'criminal cause or matter' within the meaning of the Supreme Court of Judicature Act, sec. 47."

It is contended that the mere fact of having inserted in the Consolidated Statutes of 1859 the Act concerning lotteries under the title "Criminal law," in effect consti-

tutes it a crime. Text writers have often said that the preamble of a statute may remove certain doubts as to the text, but this is the first time that it has been pretended that the title or classification of a statute is to be construed as part of it. Who would contend seriously that a public statute included by error or otherwise among the private statutes bound separately at the end of each volume of the statutes of each session of Parliament, could become, merely on this account, a private statute? For a similar reason, the insertion of statutes actually in force in a schedule of repealed Acts is of no consequence: 22 Vict. ch. 29, sec. 11, 1859; 49 Vict. ch. 4, sec. 10, 1885. Classifications are never absolute any more than marginal notes or references to formerly existing laws. Notwithstanding classification, we find an infinity of criminal offences outside the chapter relating to criminal law, and in them we find a great number of simple breaches of municipal and police regulations, and even provisions in respect to civic and municipal law. See C.S.C. 1859, ch. 6, secs. 85, 86, 88; ch. 17, sec. 55; ch. 29, s. 8; ch. 31, s. 55; ch. 92, sec. 80; ch. 93, secs. 25, 26, 27, 28; ch. 95, sec. 3; ch. 96, secs. 1, 13, 14.

A statute must be construed by considering the import of the context: 22 Vict. ch. 29, secs. 8 and 9. In the present case, at least, the classification is a mere matter of form, a work of secondary consideration and simple convenience.

But even if the classification of the Consolidated Statutes of 1879 could have the effect which is claimed for it, it has not been continued in those of 1886, and it is under these latter that the nature of the offence of operating a lottery must be determined.

It has further been objected that the Interpretation Act of Canada, 1867, 31 Vict. ch. 1, sec. 7, par. 20, has the

effect of completing the statutory provisions relating to lotteries by declaring that the breach of any statute which does not constitute an offence of any other nature shall be a misdemeanour and punishable as such: "Any wilful contravention of any Act, which is not made any offence of another kind shall be a misdemeanour and punishable accordingly.

This provision refers only to legislative Acts of the Dominion of Canada (sec. 3), and consequently cannot apply either to the statutes of the late Parliament of United Canada, nor to those of the Provincial Legislatures. It does not even affect ch. 159 of the Revised Statutes of Canada of 1886, which practically reproduces ch. 95 of the Consolidated Statutes of Canada, 1859, because it was not reproduced in the Interpretation Act of the Revised Statutes.

But, supposing that this provision is still in force, does it apply to a lottery? Is the offence of operating a lottery an undefined and unknown one? If the Revised Statutes had simply prohibited lotteries, if they had said nothing more, it might perhaps be contended that this simple prohibition made it a misdemeanour. But it is provided that the offender will incur a fine of \$20 to be recovered in a summary manner before a justice of the peace, and this, in effect, defines the offence as being a simple contravention. If the fine is paid there cannot even be imprisonment.

Finally, by paragraph 21, the Interpretation Act of 1867 declares that offences exist that are not misdemeanours.

"Whenever any wilful contravention of any Act is made an offence of any particular kind or name, the person guilty of such contravention shall on conviction thereof be punishable in the manner in which such offence is by law punishable."

The offence of holding a lottery has not perhaps any particular designation or name, but it is of a special nature or kind and is known under the general name of a simple penal offence or contravention.

It appears to me evident that the offence of operating a lottery was not a crime before the Criminal Code, neither under the old statutes of Canada, nor in virtue of the laws enacted after Confederation, and that consequently it was a subject matter in respect to which the Provincial Legislature had authority to legislate.

I cannot discover in it any of the characteristics of crime. I cannot see that a lottery in a municipality, or even within a Province, can affect or be of interest to the whole country. Neither can I see any necessity for intervention by public authority for its prosecution and punishment. No infamy is attached to conviction, not even simple incarceration, much less imprisonment with hard labour. It is a matter, in my humble opinion, of a simple breach of regulations of a police or local nature, punishable by a light fine—like an infinity of other offences within the jurisdiction of the Province—before local magistrates, for the advantage of the prosecutor who alone undertakes the responsibility of the prosecution, and who might even abandon it or make a compromise. I cannot conceive how I can declare criminal the commission of an act permitted by the common law at least until constrained to do so by precise and positive statutory enactments. Crimes cannot be presumed; it is necessary to have a clear text of law to create them, and particularly so when in derogation of the common law.

I am therefore of opinion that the legislation of the Province of Quebec concerning lotteries is constitutional, and consequently that the contract upon which the respondent bases his action is valid. I find less difficulty in

arriving at this conclusion inasmuch as the appellant has not thought proper to question the legality of that contract in his defence. Judging from the record it is only before this Court that the appellant has seen fit to raise the question for the first time. And if it is true that a defence of this nature ought not to be received with favour, as the Courts have declared on many occasions, much more ought it to be so in a matter in which it has never been pleaded: *Wallbridge v. Beckett*, 13 U.C.Q.B. 395; *Evans v. Morley*, 21 U.C.Q.B. 547.

The appellant's only serious plea is an exception of compensation which very properly was rejected; but the mere production of such an exception constitutes an admission on the part of the defendants that the action and the contract upon which it is based are well founded.

And further still, the appellant's claim for compensation is based upon the very deeds and contracts which are now complained of as illegal in the factum and oral pleadings before this court. The appellant actually alleges:

"17. Que les dits Brault et Labrecque, a partir du deux de novembre mil, huit cent quatre-vingt-douze (1892) jusqu'au premier juillet mil huit cent quatre-vingt-treize (1893), exploité la dite loterie appelée "La loterie Mont-Royal," comme agents et mandataires de la dite défenderesse et notamment le dit demandeur, tant en vertu du dit acte de conventions, en date du vingt sept. (27) décembre mil huit cent quatre-vingt-dix (1890) et du dit acte de conventions en date du dix-neuf mars (19) mil huit cent quatre-vingt-douze (1892), qu'à l'occasion de ces actes et en continuation de leur mandat résultant de ces dits deux actes, pour le bénéfice et avantage de la dite défenderesse."

Then the appellant prays that the Court may declare the demand of the respondent more than compensated,

reserving for the surplus, still in virtue of the same deeds and contracts, the right of taking such further action as may be deemed proper.

Finally, even supposing that the lottery in question was not authorised by competent authority, I am far from entertaining the opinion that the deed of the 19th of March, 1892, which formed the basis of the present action, is affected by the illegality of the lottery. It is not this deed which provides for its organization or for its operation, but the other deed of the 27th December, 1890, which is not mentioned in the latter, except in an incidental manner. The deed of 1892 is an ordinary contract of loan, distinct from the first agreement, the duration of the lottery organized by virtue of the first deed being merely mentioned for the purpose of fixing the date for the repayment of the loan and the rate of interest. There is no question of a loan "by any lottery, ticket, card or other mode of chance whatsoever," which the laws of Canada have in view: C.S.C. 1859, ch. 95, sec. 3; R.S.C. 1886, ch. 159, sec. 4. The appellant received from the respondent \$30,000 in one sum in current money which was the property of the respondent and his partner, before the commencement of the lottery operations, and simply promised to return this sum with a rate of interest varying from four to five per cent., according to the duration of the lottery. That is all. Before the loan, this sum was on deposit at interest in a bank to the credit of the respondent and Labrecque, his partner (from whom he subsequently acquired all rights) as a guarantee for the due execution of the obligations stipulated in favour of the appellant. It is to-day contended that the appellant should keep this sum during a term of years without interest. It is even suggested in the factum that perhaps the appellant need not return the capital, except on the

principle of the moral obligation—which is not always true in law—"that no one may enrich himself at another's expense." Common honesty should at least require the appellant to offer to the respondent the interest that he and his partner were receiving from the bank upon these same funds at the time they were borrowed by the appellant, not for the purpose of operating a lottery, but to complete the construction of the "Monument National."

It matters not whether the appellant and the respondent have or have not operated an illegal lottery; that could not prevent one of the parties from lending his own monies to the other at any legal rate of interest which might be stipulated: *Clark v. Hagar*, 22 Can. S.C.R. 510; 15 Am. & Eng. Encycl. of Law, 2nd ed., p. 992, vo. "Illegal contract."

For these reasons I am of opinion that the appeal should be dismissed with costs.

*Appeal allowed (GIROUARD, J. dissenting.)*

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Lamothe & Trudel.*

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## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE THE FULL COURT.

Ex parte GORMAN et al.

*Disqualification of magistrate—Pecuniary interest—Canada Temperance Act—Fines payable to municipality—Magistrate a ratepayer of the municipality—Magistrate's salary paid out of general fund into which fines are paid—Summary conviction—Imprisonment for non-payment of fine—Cr. Code sec. 872.*

1. A magistrate is not disqualified from trying a case by reason of the fact that his salary is paid out of a municipal fund largely made up of fines imposed for the infraction of the statute under which the charge is laid.
2. A magistrate is not disqualified from trying a case because of his being a ratepayer of the municipality to which, in case of conviction, the fine would be payable.
3. A magistrate trying a case under the summary convictions clauses may, under Cr. Code sec. 872, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels.

DECIDED: February 5, 1898.

These were fifteen cases arising under the Canada Temperance Act in which orders nisi for certiorari were granted in vacation. They were argued together upon practically the same points.

The grounds taken at the argument, upon which it was contended that the rules should be made absolute, were:—

1. That the convicting magistrate had no jurisdiction, as the police magistrate of Moncton was able to sit and was not disqualified.
2. That it does not appear from the evidence that the convicting magistrate was a resident of Moncton.
3. No evidence that the defendant kept the place where the intoxicating liquor was sold.
4. Magistrate was disqualified, being a ratepayer and



resident of Moncton, and being paid a salary by the city of Moncton as City Court Commissioner.

5. The magistrate was disqualified, being an inhabitant of Moncton and one of the corporation.

6. That the conviction is bad because it does not award distress.

*David Grant* and *H. C. Hanington*, in support of the rules nisi.

*W. B. Chandler* and *D. I. Welch*, contra.

FREDERICTON, N.B., February 5, 1898.

TUCK, C.J.—

I think that all the points were disposed of at the argument except the one as to the personal disqualification of the magistrate because he had a pecuniary interest in the fines imposed.

This objection to the magistrate's jurisdiction is that he is disqualified through interest, as he is a resident and ratepayer of the city of Moncton, and his salary as City Court Commissioner of said city is paid out of the miscellaneous funds of the city, which are largely made up of fines and costs collected in the police court of Moncton by the said magistrate.

The question to be determined is whether or not this is such an interest as to disqualify the magistrate.

If *Ex parte Driscoll*, 27 N.B.R. 216, is still the law, it is absolutely decisive of the present case. That was a conviction before the police magistrate of the city of St. John for selling liquor without license, contrary to the Liquor License Act of 1887. It was argued in that case that the police magistrate was disqualified from trying complaints by reason of his being a ratepayer, but the

court held that this was not a disqualification. Counsel, in arguing, said that no jurisdiction is conferred upon him by Con. Stat., ch. 61, sec. 2, for the words "and other matters" do not extend the meaning of the preceding words. Allen, C.J., in delivering judgment, says: "Some effect must, if possible, be given to all the words; and we think the general words of the section under consideration were intended to apply to any case, the subject-matter of which would have been within the jurisdiction of a justice to adjudicate upon but for the fact of his being a ratepayer in the city, county, or parish where he was called upon to act, and that the clear object and intention of ch. 61 was to remove that disqualification and to give a justice jurisdiction in such cases notwithstanding his interest as a ratepayer." Nothing was said in the argument of counsel or in the judgment of the court that a police magistrate is not mentioned by name in sec. 2 of ch. 61, and that sec. 2 applies only to justices of the peace. I find, however, in the information laid before James Kay that he is described as one of Her Majesty's justices of the peace and a stipendiary and police magistrate in and for the county of Westmorland, and in the information laid before Harvey Atkinson he is described in the same manner. I do not see how this case can be distinguished from *Ex parte Driscoll*, 27 N.B.R. 216.

In *Regina v. Grimmer*, 25 N.B.R. 424, it was decided that it is not a disqualification that the justice was appointed and paid by the town council, at whose instance the complaint was made and the prosecution carried on, his salary being a fixed sum not dependent on the amount of the fines collected.

In *Regina v. Fleming*, 27 Ont. R. 122, the defendant was convicted before the police magistrate of the city of Brantford of an offence under the Liquor License Act, and

it appeared upon affidavit that the magistrate was paid his salary by the municipality of Brantford, and that he was a ratepayer of the city. The court held that under the Revised Statutes of Ontario the magistrate was not thereby disqualified, and that the term "magistrate" used in the section clearly included a police magistrate. Armour, C.J., in delivering judgment says also: "I do not think that the fact that the police magistrate was a ratepayer of the city of Brantford, to which the fine imposed by the conviction was payable, would have disqualified the police magistrate at common law from trying the case."

The rules in the fifteen cases must be discharged.

LANDRY, J.—

In these fifteen cases two points only are left for our decision, namely :—

1. Was the police or stipendiary magistrate, who convicted, disqualified by reason of his being a ratepayer of the city of Moncton? and

2. Was he disqualified for being, as City Court Commissioner, in receipt of a fixed salary (not dependent on the fund), but payable out of the miscellaneous fund partially made up of fines under the Canada Temperance Act?

As to these points the authorities seem to establish quite clearly that no judge, having a direct pecuniary interest, however small, in the result of a cause whether civil or criminal, should sit upon the same. In *Ex parte Laughey*, 28 N.B.R. 658, we find the following: "Any pecuniary interest, however small, disqualifies," etc.

Our Legislature over and over again has admitted the existence of this principle by enacting laws removing the

disqualification of Supreme Court judges, County Court judges, magistrates, parish court commissioners, police magistrates, etc., arising out of pecuniary interest, which they were recognized as having because of their being ratepayers in districts interested in the results of suits coming before them, or because of some other possible pecuniary interest in the results of such suits.

In these fifteen cases the police magistrate had indirectly a pecuniary interest in the result of his findings. I am free to admit that I do not believe the interest in these cases was such as to create bias; yet the principle remains the same. If it was not for *Ex parte Driscoll*, 27 N.B.R. 216, I would not have a particle of hesitation in saying that in all these cases the convicting magistrate was disqualified by reason of his having some pecuniary interest in the result of his finding. If *Ex parte Driscoll* is binding on this point, then the convictions in my opinion should stand. But it appears to me that the court is free to consider *Ex parte Driscoll* so modified by *The City of Moncton v. Hebert*, decided in Michaelmas term, 1896, as to leave the matter open to another conclusion. The *Driscoll* case and these cases stand in precisely the same position so far as relates to the interest of the presiding magistrates as ratepayers, and as to the respective jurisdictions given them by the Canada Temperance Act and by the Liquor License Act, 1887, respectively. But, reading the *Driscoll* case carefully through, I fail to find the point taken that a distinction should be made between a police magistrate and a justice of the peace. The second section of ch. 61 of the Consolidated Statutes speaks of a "Justice of the Peace," and does not refer to a police magistrate. The judgment of the court in *Driscoll's* case, while it declares the "magistrate" qualified by reason of sec. 2, ch. 61, yet

gives reasons for such conclusion that lead me to the belief that the point was not taken before the court, nor was the mind of the court in giving judgment directed to the point that even if that section qualifies a justice of the peace in acts within his jurisdiction, it does not so qualify a police magistrate in acts not within the jurisdiction of a justice of the peace. The reasoning of the court for the judgment on that point is applied to the meaning of the words in sec. 2, "or any other matter within their jurisdiction," etc. The court holds that these words were "intended to apply to any case the subject-matter of which would have been within the jurisdiction of a justice to adjudicate upon but for the fact of his being a ratepayer." With that reasoning I agree; but the attention of the court was not drawn to the important fact that the case before them was not one "the subject-matter of which was within the jurisdiction of a justice." Here, in this case, I apply the same doctrine, "or any other matter within the jurisdiction" applies to any case, the subject-matter of which is within the jurisdiction of a justice of the peace to adjudicate upon; but in this case the subject-matter does not come, it appears to me, within the jurisdiction of a justice. The complaint in this case could not be heard by a justice, and sec. 2, above cited, does not apply to a police magistrate.

However, as my judgment herein cannot affect the result, a majority of the court controlling it, and as I have not been able to see the judgment in the Hebert case, it having been mislaid, and therefore cannot verify for myself that it overrules the Driscoll case, I will not absolutely dissent from the judgment of the majority in this case.

HANINGTON, J. (dissenting).—

In these cases motions are made to quash convictions

under the Canada Temperance Act. In the Wallace case the complaint was heard and the conviction made by D. Grant, Esquire, as sitting police magistrate of the city of Moncton, in room of the late police magistrate, Mr. Wortman, he being unable to preside. In the other cases the hearings were before and convictions were made by the police magistrate. The convictions and warrants of commitment follow the forms prescribed by the statute relating to proceedings on summary convictions, and are not in the form prescribed by the Act of 1888, which is an Act in amendment of the Canada Temperance Act, and prescribes certain forms as those which shall be sufficient.

The facts are contained in the return and affidavits, and are not substantially in dispute. The inhabitants of a certain part of the parish of Moncton were and are incorporated as the city of Moncton. The Act of 1893, ch. 47, sec. 12, amending and re-enacting the charter of the city, directs all fines, penalties, and costs imposed by the police magistrate to be paid into the city treasury as follows: "All sums of money received by the said Police Magistrate, or at the said police office, or by the magistrate sitting at the police office in his stead, for fees, fines, penalties, forfeiture or costs incurred, or paid under the provisions of any law or statute in force in the said Province, or of any by-law or ordinance of the City Council of the City of Moncton, or for any costs whatever by him receivable in any criminal matter whatever, shall be paid over by the said Police Magistrate on the first day of every month, not being Sunday or a public holiday, together with an account under oath to be sworn, etc., . . . of all such moneys to the Treasurer of the City of Moncton, to be by him kept and applied for the purposes of the city."

It appears by the affidavits that under this section all

amounts received as fines, penalties, and costs are paid into the city treasury and form part of the general funds of said city as part of its miscellaneous revenues, and form part of the fund from which miscellaneous and unforeseen expenses are paid, and the amount of such receipts for the present year, up to about the middle of September, amounted to something like two thousand five hundred dollars; that the committing (sitting) police magistrate in the Wallace case has been for the past year and upwards a resident and inhabitant of the city and a ratepayer thereof, and for the year beginning in January last, and ending in December, was assessed within the city on real estate and income in the sum of forty dollars and thirty cents, and the police magistrate sitting in the other cases stands in the same position as to being a resident and a ratepayer to about the same amount; that the prosecutor was and is one of the policemen of the city who prosecuted the offences under the Canada Temperance Act under the authority and direction of the city authorities, being specially appointed by the city council for that purpose.

As I have no doubt the first objection is fatal to the convictions, it is unnecessary for me to determine the effect of the second and third. At the same time it is as well to state that I am of the opinion as to the second objection that each inhabitant as a corporator of the city is, through his municipal representatives, the city council, interested in the prosecution for any penalty the city, by its council, authorize and direct, and therefore the police magistrates were so situate in these cases. By the rules of common law, whether a person in that position can act in a judicial capacity or not depends on the extent that such a position might bias or influence him, not that it did or would, but reasonably, though unconsciously, might influence him. See *Regina v. Farrant*, 20 Q.B.D. 58; *Regina v. Steele*, 26 Ont. 540.

Whether it would here alone, outside of his pecuniary interest as a ratepayer, disqualify him from acting, it is not necessary for me now to determine. The principle adopted by our court as to bias affecting or disqualifying a judicial officer is the same as that involved in a challenge of a juryman for favour: *Ex parte William Wallace*, 26 N.B.R. 593; *Ex parte M. Wallace*, 27 N.B.R. 174; *Ex parte Jones*, 27 N.B.R. 552, and I am inclined to think that the relation of the convicting judge in these cases would come within that principle.

As to the third objection, I think that had not the provisions of sec. 872 been inserted in the code of 1892, the Act of 1888, ch. 34, sec. 14, an amendment of the Canada Temperance Act, prescribing as it does forms of conviction and warrants of distress for cases like these, would have excluded the operation of the provisions of the former summary convictions Act, because the amending Act prescribed forms, and though it in its terms is not imperative as to their use, yet under the authorities they would be read as such; see *Regina v. Sullivan*, 24 N.B.R. 149. But sec. 872, by its sub-sec. A, distinctly declares that whether the principal Act declares a form or mode of recovery or not, the convicting justice or tribunal may order a committal without any order for distress, which seems effectually to dispose of this point.

Let me now consider the first objection. At common law it is a clear and distinct principle underlying all judicial jurisdiction that the court must be absolutely free from any pecuniary interest. The law does not thereby intend that though so interested, a judge may not be fair and impartial, but it has placed this safeguard around its tribunals of justice that they may be free from temptation and above suspicion. Paley on Convictions, at page 43, when discussing generally the power and qualification of



justices, says: "But that power is accompanied with this further qualification that no magistrate, however duly authorized in all other respects, can act judicially in a case wherein he is a party. The plain principle of justice that no one can be a judge in his own case pervades every branch of the law, and is as ancient as the law itself. This is so fundamental a maxim as not to be overruled by any prescription." In *Dimes v. The Grand Junction Canal Company*, 3 H.L. Cas. 759 at p. 785, the Lord Chancellor had granted relief sought by a company in which he was a shareholder, and it was held that he was disqualified on the ground of interest from sitting as a judge in the cause, and that his decree must be reversed. And Dwarrris, at page 45, says: "Not only should persons interested in a decision take no part in it, but they should also avoid giving any grounds for the belief that they influence others in arriving at a decision."

The fact of a justice having a pecuniary interest in the result of an adjudication is entirely different in its effect from the fact of his being in a situation where, though free from pecuniary interest, yet, under the circumstances, he might reasonably be biassed. In the latter case his adjudication might or might not be invalid and set aside. That would depend on the circumstances in each case, but in the former his pecuniary interest, however small, would disqualify him. In *Regina v. Rand*, L.R. 1 Q.B. 230, which was a case in which the bias of the justices was in question, they being trustees for a society and holding bonds of a company interested in the order made by the justices, Blackburn, J., says: "There is no doubt that any direct pecuniary interest, however small, in the subject of enquiry, does disqualify a person from acting as a Judge in the matter, and if by any possibility these gentlemen, the mere trustees, could have been liable to costs or to

other pecuniary loss or gain in consequence of their being so, we should think the matter different from what it is, for that might be held an interest, but the only way the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest but of a challenge to the favour."

It will be readily noticed that the court in this case, on the facts, found that the justices had no pecuniary interest, but had the facts made out that a pecuniary interest, however small, existed in the justices, their adjudication would have been held invalid. The same principle is affirmed in *Regina v. Farrant*, 20 Q.B.D. 58, decided in 1887, where the cases bearing on the disqualifying effect of pecuniary interest as well as bias are reviewed, and the facts in that case did not bring it within either principle, yet Stephen, J., in the judgment of the court, says: "The legal principles on which the decision of this case turns are as follows: In the first place it is a leading principle of English law that no one is allowed to be a judge in his own case. That means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. This rule has been carried very far. For instance, in such cases as *Dimes v. Proprietors of the Grand Junction Canal*, 3 H.L. Cas. 759, and *Regina v. The Recorder of Cambridge*, 8 E. & B. 637, where the rule is stated as strongly as possible." And in *Reg. v. Meyer*, 1 Q.B.D. 173, Blackburn, J., referring to the case of *Regina v. Rand*, L.R. 1 Q.B. 230, says: "The effect of our judgment in that case was that, though the pecuniary interest in the subject-matter in dispute, however small, disqualifies the Justice, yet the mere possibility of bias did not ipso facto avoid the Justices' decision." There is no doubt that the sitting police

magistrate and police magistrate in the cases now before us had as residents and ratepayers of Moncton a pecuniary and a direct pecuniary interest in the result of the adjudication. They were in a position to gain or lose, depending on the result of their own adjudication in each case; to gain by a considerable lessening of personal taxation and saving of costs if the defendant was convicted, and to lose in each respect if the prosecution failed, and therefore were, beyond doubt, disqualified at common law to act as a judge in the matter.

The case of *Regina v. Gaisford*, [1892] 1 Q.B.D. 381, seems to me directly in point as to the effect of pecuniary interest as well as bias. In that case one of the convicting justices had moved some resolution as to the removal of the rubbish, for the placing of which he afterwards convicted the defendant, and was a ratepayer of the parish. The rubbish was ordered to be sold, and the proceeds went to repair the roads in the parish of which the justice was a ratepayer. On motion to quash the conviction the court quashed it, holding that moving the resolution was evidence of bias, and one of the justices being a ratepayer, and as such interested in the proceeds of the sale, disqualified him from acting. Mathew, J., says: "I am of opinion this rule must be made absolute. Two grounds of objection have been taken to the decision of the Justice. First, it is said that he has taken such a part in initiating these proceedings that he must be deemed to be within the rule disqualifying a magistrate from sitting on the ground of bias. Secondly, the more technical point is taken that he had a pecuniary interest in the result. It was urged on his behalf that it was incumbent on the complainant to shew that the justice was in fact influenced, but in my opinion it is sufficient to shew, as was held in *Regina v. Milledge*, 4 Q.B.D. 332,

that he might have been influenced." After discussing the facts he says: "The second objection that the magistrate was pecuniarily interested as being a ratepayer in the parish is a highly technical one, but we must deal with it. Under the Public Health Acts magistrates and others are in many cases relieved of this objection, but where there is no statutory relief the objection remains. On both grounds, therefore, the objection to this order has been made out, and this rule must be made absolute with costs against the local authorities."

A. L. Smith, J., says: "I am of the same opinion, and think that the magistrate was in this case under an incapacity to adjudicate upon the summons. It is a well-known law that a man shall not act both as accuser and Judge, and also that a man shall not act as a Judge in a case in the decision of which he has a pecuniary interest unless relieved by statute. The fact that a man has even the slightest pecuniary interest operates to disqualify him from adjudicating upon a case, and there is here no statutory relief from such disqualification."

In the convictions now before us the police magistrate did not and could not sit and determine them as a justice of the peace. The words of sec. 2 of ch. 61, the qualifying statute, mentions only and relates solely to "justices of the peace." Its words are: "It shall and may be lawful for any justice of the peace in this Province to make," etc. It does not use the word magistrate, or any word embracing any officer other than a justice of the peace. And therefore I think, as in the Gaisford case, the disability of the police magistrate here is not in any way removed by the statute.

This case is, I think, similar in principle to the case of the *City of Moncton v. Anastasia Hebert*, decided by this court on my reference of it in November, 1896. In that

case the city sued for light service. By the statute the moneys recovered or paid went into the city treasury as part of the general revenues. The judge of the city court, also a justice of the peace, before whom the case was tried, was a ratepayer of the city and interested in the increase or diminution of its revenue. It was contended by the city, on the argument on review before me, and also before this court, that sec. 2 of ch. 61 applied to and removed any disqualification from interest. I referred that point to this court, and it, after full argument, held that the statute did not apply to or qualify the judge of the city court, though he was a justice, and that his interest as a ratepayer disqualified him from acting, and directed the reversal of the judgment on that ground, which I accordingly did. I am not aware of any principle or cases that determine that pecuniary interest which will disqualify in a civil suit does not disqualify in a prosecution for penalties in such a case as that before us, where any fine or costs directly lessen each ratepayer's burthen of taxes; on the contrary, I think such interest will disqualify alike in both. The principle of "*ex necessitate*" was urged in support of the jurisdiction in the Hebert case. It does not apply in this case, for two justices can adjudicate for penalties here sought to be recovered. Here the council of the city of Moncton resolved that the city, by its officers, should become prosecutors for offences under the Canada Temperance Act, the result of which is that the city and its taxpayers receive the benefit of all fines and penalties and costs recovered, and are responsible for the prosecutions and costs. Whether the reason for assuming the position of prosecutors was to secure the more efficient enforcing of the Act, or for fiscal reasons, it is unimportant to enquire, nor is it of importance here to enquire whether the city

ordered the prosecution or not whereby each corporator becomes a prosecutor, as that relates only to bias and not pecuniary interest, which I am now discussing. The effect is the same to disqualify the ratepayers from acting as judges in any prosecution for penalties under the Act unless legislative enactment removes such disqualification. That legislation now exists as to justices of the peace acting simply as such, but so far as the counsel could point out to us, or I can discover, no statute removes the disability as to such an officer as the police magistrate or sitting police magistrate for Moncton, who is not sitting or acting as a justice of the peace, but is filling a higher and different office, and having and exercising an entirely different and higher jurisdiction. He does not sit or act under his commission as a justice of the peace, but under his commission as a higher and entirely different officer. I have not overlooked the consideration of *Ex parte Driscoll*, 27 N.B.R. 216, cited as deciding that ch. 61, sec. 2, applied to and removed the disability of a police magistrate. As I read that case, it did not turn on the point I am now discussing; in fact, that point was not raised. The counsel seem to have taken it for granted that ch. 61, sec. 2, removed the disqualification, and the only contention in respect to the magistrate's jurisdiction was whether the words "*or any other matter within their jurisdiction*" enabled the police court to deal with the matter then before it, or was its jurisdiction limited to matters ejusdem generis, the subjects expressly mentioned in the first part of the section. The court decided that the words I have above quoted gave the court jurisdiction over the subject then in contention, but did not discuss, or I think determine, the question of that section applying to and removing disqualification of a court superior to and different from a justice's court. If the parties did not

raise that particular point now here and on the trial raised (and I can see good reasons if they had confidence in the court why they should not), the court would not raise or deal with it. Pecuniary interest is an objection that can be waived: *Wakefield v. W. R. & G. Railway Company*, L.R. 1 Q.B. 84. And, as I have said, this court would not of itself raise and decide it. But even if the Driscoll case dealt with and decided this point in 1888, the case of Anastasia Hebert, decided in 1896, overrules it, or at least leaves the question open for us now to determine independent of a binding authority of our court. I think the case of Hebert was, after a full discussion, rightly decided, and it is in accord with the principles of common law. Let the Legislature amend and extend the provisions which remove disqualification from pecuniary interest if they will, but until they clearly do so I feel bound to follow and maintain those long established principles which disqualify judges of any court from sitting and adjudicating in cases in which they have a pecuniary interest, and until the Hebert case, decided by this court within a year, is overruled, I am bound by it. It was contended, among other things, that the sums paid into the city treasurer's hands for fines, etc., under the Canada Temperance Act would not by law go into the treasury for general purposes, but must be by the city authorities appropriated solely for the carrying out of the Act. A plain answer, I think, to that is the fact, which is not disputed, that such moneys are paid out and appropriated for general purposes and not for expense of prosecuting offenders under the Canada Temperance Act alone, and the city, who are the prosecutors here, could scarcely avail themselves of such an answer, as they could take them to relieve themselves of costs for which they are liable in case the prosecution fails. But, irrespective

of this consideration, I think that the words of the statute and order in council allowing the money recovered to go to any city or body corporate or others who prosecute under the Canada Temperance Act are quite broad enough to justify the appropriation of any penalties recovered for general purposes by the city or town which prosecutes, and is so authorized. Instead of going to the Crown, they go to the city or town for the purposes of the Act, and the purpose contemplated is that the Act shall be enforced. That enforcement, or the means adopted for it, is not intended, I think, to be limited to the penalties recovered, but the general burthen of enforcement is on the city or town undertaking it, and consequently with the burthen follows the right to control the penalties absolutely and not as trustees. And I think we have an express judicial determination that such general appropriation is justified and intended in the judgment of the Supreme Court of Canada in the case of *The Town of St. Stephen v. The County of Charlotte*, 24 Can. S.C.R. 329 at p. 340, where Sedgewick, J., in his judgment, which was substantially the judgment of the court, says: "The evident policy and intention of the Governor-General in Council in making the order in question, and specifying the authority entitled to all fines recovered under the provisions of the Canada Temperance Act, was doubtless to give effect to the principle expressed in the maxim, 'qui sentit commodum sentire debet et onus' (he who sustains the burden ought to derive the advantage). It was contended that where a city, county, or town, with a view to the public welfare, undertook to and did incur the expense of enforcing the Canada Temperance Act, the enforcing authorities should receive the moneys recovered thereby, which would otherwise belong to the Crown. This manifest intent must be borne in mind in giving a



meaning to the order in council, and effect must be given to that aim if it can be done consistently with the terms in which the order is expressed."

The convictions are, I think, bad, and the rules must be made absolute in all the cases where the presiding officer, whether the acting police magistrate or the police magistrate of Moncton, adjudicated.

*Rules discharged, HANINGTON, J., dissenting.*

**Note:** *Disqualification of magistrate—Pecuniary interest.*

See Notes Vol. I., page 411, and Vol. II., page 442; *Ex parte McCoy* (N.B.) 1 Can. Cr. Cas. 410; *Reg. v. Herrell* (Man.) 1 Can. Cr. Cas. 510; *Reg. v. Steele* (Ont.) 2 Can. Cr. Cas. 433; *Ex parte Flannagan* (N.B.) 2 Can. Cr. Cas. 513.

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## [COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, CHIEF JUSTICE OF ONTARIO, AND OSLER,  
MACLENNAN, MOSS AND LISTER, JUSTICES OF APPEAL.

## THE KING v. BURNS, (No. 1).

*Leave to appeal—Acquittal by magistrate—Application by prosecutor—  
Perjury—Corroboration—Admissibility of evidence—Error—Cr.  
Code, secs. 744, 791.*

1. Leave to appeal to the Court of Appeal under Cr. Code, sec. 744, as amended in 1900 should not be granted to a private prosecutor except under exceptional circumstances.
2. Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corroborative only.

ARGUED: March 12, 1901.

DECIDED: March 19, 1901.

Motion on behalf of Thomas Ratcliffe the private prosecutor for leave to appeal from the decision of the police magistrate for the city of London acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal for Ontario the following questions:—(1) Whether there was corroborative evidence of the prosecutor in any material particular; (2) whether the magistrate exercised a legal discretion under sec. 791 of the Criminal Code in deciding to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the County Crown Attorney, in the absence of counsel for the Crown.

The prosecution arose out of evidence given by the defendant as secretary of the Crescent Mill and Timber Company in an action in a division court brought by one Ratcliffe against the company.

The following portions of sections of the Criminal Code are applicable :—

742. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and eighty-five, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

743. (2) The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal in manner hereinafter provided.

(3) Either the prosecutor or the accused may during the trial either orally or in writing apply to the court to reserve any such question as aforesaid.

744. If the court refuses to reserve the question, the party applying may move the Court of Appeal as hereinafter provided.

(2) The Attorney-General or party so applying may, on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may, upon the motion and upon considering such evidence (if any) as they think fit to receive, grant or refuse such leave.

791. If, in any proceeding under this part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any

other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; . . .

TORONTO, March 12, 1901.

*W. H. Bartram*, for the prosecutor: Under sec. 744 of the Code, as amended by 63 & 64 Vict. ch. 46 (Can.), the right to move for leave was expressly given to the prosecutor, by providing for notice to the accused, and under sec. 791 of the Code the magistrate had no jurisdiction, because the defendant was a client of the Crown Attorney, who should have prosecuted, and this was a "circumstance" within the meaning of that section. The word "may" in that section must be construed to mean "shall." The ruling of the magistrate that there was no corroborative evidence was matter of law, not fact, because there were letters written by the defendant corroborating the evidence of the prosecutor, and proved at the trial, and the magistrate not calling for evidence for the defence, his decision was clearly one of law, and, therefore, appealable.

No one for the defendant.

TORONTO, March 19, 1901.

ARMOUR, C.J.O.—

The prosecutor laid an information before the police magistrate charging the defendant with perjury in an action brought by the prosecutor in the 1st division court in the county of Middlesex, in swearing that he, the defendant, had made an agreement with the prosecutor to pay him \$2 a day for his services on condition that the timber

purchased by him did not cost more than a specified sum per M, when in truth and in fact no such condition was made or agreed to. The defendant, being brought before the police magistrate upon this information, elected to be tried summarily, and the police magistrate, after hearing all the evidence on the part of the prosecution, acquitted the defendant, without calling on him for his defence, on the ground that the prosecutor's evidence was not corroborated in any material particular.

If the police magistrate had no jurisdiction to try this charge summarily, as to which I say nothing, he had jurisdiction to take the information, to bring the defendant before him, and to hear the evidence on the part of the prosecution, and, if he thought the evidence sufficient to put him on his trial, he might have committed him, and if he was of opinion that no sufficient case was made out to put him on his trial, it was his duty to discharge him. Assuming that the police magistrate had no right to try the defendant for the offence charged, his acquittal of him may be treated as equivalent to a discharge of the defendant upon the preliminary inquiry, which he was undoubtedly authorized to make.

And being treated as a discharge on a preliminary inquiry, as I think we ought to treat it if the police magistrate had no jurisdiction to try the offence summarily, the prosecutor is still at liberty to be bound over to prosecute under sec. 595 of the Code, and, as this is the special remedy given to the prosecutor in such a case, I do not think that the course he has taken in applying to this Court under sec. 744 is open to him.

Assuming, however, that the police magistrate had jurisdiction to try the offence charged, I think that the defendant was rightly acquitted.

The only evidence of the falsity of the defendant's oath

was that of the prosecutor and the letters which were relied on as corroborating his evidence, but these letters did not in law or in fact corroborate the prosecutor in any material particular implicating the defendant.

The application must, therefore, be refused.

OSLER, J.A.—

The case is one in which the police magistrate has tried and acquitted the accused under sec. 786 of the Code, he having elected to be tried summarily instead of having the charge "sent for trial by a jury." It appears from the record and affidavits that the magistrate did not "decide not to adjudicate summarily" (sec. 791), and was not holding a preliminary inquiry for the purpose of ascertaining whether the accused should be committed for trial (sec. 792), and he did not dispose of the charge in that manner, *i.e.*, as one not sufficiently made out to warrant a committal. Beyond question, he tried the case summarily and in express terms acquitted the accused, and that is the only way in which we can look at it.

The prosecutor now asks for leave to appeal, and it would almost seem that, contrary to the whole spirit of English law as it has for ages been administered in courts of justice, the Criminal Code has been so framed as to afford ground for the contention that an accused person may be placed a second time in jeopardy of life or liberty after he has been acquitted upon a trial before a competent tribunal: sec. 744, 63 & 64 Vict. ch. 46 (Can.). Whether this be so or not, having regard to the group of sections 742-747, as to which it is not now necessary to express an opinion, I will say, for myself, that the circumstances under which a leave to appeal should be granted which may bring about such a result must be nothing short of extraordinary. It is right and entirely reasonable that a

convicted person should have an opportunity of obtaining a new trial or of having his conviction reconsidered upon a point of law, or even upon the facts, but to place the prosecutor in the same situation is to confound the essential distinction between a civil and a criminal trial which the merciful administration of our law has always preserved. Cf. *Regina v. Fitzgerald* (1876), 39 U.C.R. 297.

In this case it is said that the magistrate has erred in holding that there was no evidence to corroborate that of the prosecutor in any material particular, whereas the prosecutor contends that certain letters written by the accused do corroborate the evidence and support the charge as laid. Now, it was for the magistrate to determine whether in fact the prosecutor was sufficiently corroborated, and, even if he regarded these letters as being some evidence of corroboration, he might nevertheless have acquitted. I am not satisfied that they do amount to such, or if they do that the magistrate did not consider them and give them whatever weight they were entitled to. But, even if he is to be taken to have rejected them altogether as not being evidence, I do not think that, in such a case as this, we are bound to give leave to appeal merely because we may think he was wrong in his law. The prosecution is manifestly one which ought not to have been brought, as it is admittedly an attempt to enforce payment of a debt by criminal proceedings.

It was also urged, though no reason was suggested for it, that the magistrate had no jurisdiction to try the charge. If that were so, and it is not necessary to express an opinion on that point, it would be no ground for giving leave to appeal, the defendant having been acquitted.

MACLENNAN and LISTER, JJ.A., agreed with the judgment of OSLER, J.A.

MOSS, J.A.—

I agree that leave to appeal should not be granted.

Whatever may have been the precise form of the proceeding before the police magistrate, he had undoubted jurisdiction to deal with the case up to a certain point.

Having heard such evidence as the prosecutor chose to adduce, he decided that no case had been established.

Whether he was dealing with the case under sec. 782 or under sec. 590 *et seq.* of the Code, seems immaterial, for apparently it was competent for him at that point to decide as he did. The ground stated for his decision was, that the prosecutor was not corroborated in any material particular, and as to that I do not think there is sufficient doubt to make it proper to allow the question to be further argued in this Court.

In the circumstances of the case, the objection that the County Crown Attorney had previously acted professionally for the accused does not appear to me sufficient to deprive the police magistrate of jurisdiction.

*Leave refused.*

**Note:** See the following case.

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## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., AND ROBERTSON, J., SITTING AS A DIVISIONAL COURT.

## THE KING v. BURNS, (No. 2).

*Police magistrate—Jurisdiction—Summary trial—Perjury—Acquittal of defendant after "defence made"—Further prosecution—Taking recognizance of prosecutor to prefer an indictment—Cr. Code secs. 145, 539, 540, 595, 785, 791, 797, 799.*

1. A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury.
2. Where the offence is one which may be summarily tried by a police magistrate on consent, and the accused has consented and made his defence to the charge and been acquitted, it is no longer competent for the magistrate to turn the proceedings into a preliminary inquiry and to accept the prosecutor's recognizance to prefer an indictment.

ARGUED: April 1, 1901.

DECIDED: April 2, 1901.

MOTION on behalf of Thomas Ratcliffe, the private prosecutor, for a rule *nisi* calling on the police magistrate and the defendant to shew cause why the former should not bind over the applicant, under sec. 595, to prefer and prosecute an indictment against the defendant on the charge of perjury preferred by the prosecutor upon which the police magistrate had acquitted and discharged the defendant. The ground alleged was that the police magistrate had no jurisdiction, by reason of sec. 791 of the Code, to summarily dispose of the charge of perjury, under the circumstances set forth in the affidavit of W. H. Bartram, as follows:—

That on the 22nd February, 1901, the police magistrate heard the witnesses for the prosecution after the defendant had pleaded "not guilty" and elected summary trial; at the close of the case, and after evidence had been given to prove certain letters written by the defendant corro-

borating the evidence of the prosecutor, on behalf of the prosecutor the police magistrate was requested not to summarily dispose of the case, and upon his refusal he was requested to reserve certain questions arising upon the proceedings and evidence taken before him for the opinion of the Court of Appeal, which was also refused; the police magistrate making the following note: "I acquit the defendant, without calling on him for his defence, on the ground that the prosecutor's evidence is not corroborated in any material particular. Mr. Bartram requested that a case be reserved for the Court of Appeal on the question of corroborative evidence, and on the question of jurisdiction as well. I note that at the close of the case for the prosecution Mr. Bartram contended that I had no jurisdiction to try the case summarily because the defendant was and is a client of the Crown Attorney, and was defended by the deputy Crown Attorney at the division court proceedings in question, and that the Crown was not represented at the trial. I add, however, that Mr. Bartram prosecuted the case personally on behalf of the private prosecutor. I refuse Mr. Bartram's application to state a case on either of the questions or grounds desired."

The affidavit also stated that the Court of Appeal had refused leave to appeal (see *ante* p. 323), and that on the 25th March, 1901, the deponent attended before the police magistrate and requested him to bind over the prosecutor to prefer and prosecute an indictment respecting the charge of perjury against the defendant, but the magistrate refused to do so.

TORONTO, April 1, 1901.

*Bartram*, in support of the motion for a rule *nisi*. The order sought is in the nature of a mandamus, and

the application is under C.S.U.C. ch. 126, sec. 6. The magistrate should bind the prosecutor over under sec. 595 of the Code. The defendant elected to be tried summarily, but the magistrate should have exercised a proper discretion under sec. 791 and refused to try him; that is a legal discretion, which the Court will control. The Crown not being represented, the jurisdiction was ousted. The word "may" in sec. 791 should be construed as imperative.

TORONTO, April 2, 1901.

ROBERTSON, J.—

As to the question of jurisdiction, I am of opinion that the police magistrate was right in disposing of the case. By sec. 539 of the Code, "every court of general quarter sessions of the peace, when presided over by . . . a county . . . court judge . . . has power to try any indictable offence except" those mentioned in sec. 540.

Perjury is defined by sec. 145 of the Code, and is not included in the offences referred to in secs. 539 and 540 as those which must be tried by a superior court of criminal jurisdiction, etc., as declared by sec. 538. The general sessions of the peace, then, when presided over by a county court Judge, has jurisdiction to try an indictment for perjury.

Then, as to summary trial of indictable offences, sec. 782 of the Code declares what the expression "magistrate" means and includes; and sec. 785 declares that "if any person is charged, in the province of Ontario before a police magistrate . . . with having committed any offence for which he may be tried at a court of general sessions of the peace . . . such person may, with his own consent, be tried before such magistrate," etc.

There is, therefore, no doubt, in my opinion, that the party accused of perjury had a right to be tried summarily by the police magistrate; and, by sec. 797, whenever the magistrate finds the offence not proved, he shall dismiss the charge, etc.; and, by sec. 799, every person who obtains a certificate of dismissal, etc., shall be relieved from all further and other criminal proceedings for the same cause. The police magistrate was, therefore, right in refusing to bind the prosecutor over to prefer and prosecute an indictment against Burns on the charge of perjury; and the rule *nisi* should, therefore, be refused.

As regards the objection taken by Mr. Bartram before the police magistrate that the latter had no jurisdiction to dispose of this case because the person charged was and is a client of the Crown Attorney, and was defended by the deputy Crown Attorney in the division court proceedings where the alleged perjury was committed, I know of no law which precludes a Crown Attorney from appearing as solicitor or counsel in a civil proceeding for any client, and Mr. Bartram has cited no authority in support of his contention.

BOYD, C.—

This was a prosecution for perjury, in which the defendant before the police magistrate sought and consented to be tried summarily under sec. 785 of the Code, and thereupon pleaded "not guilty." Upon hearing the evidence the magistrate adjudicated summarily, and found the offence not proved, and dismissed the charge under sec. 797. That ended the matter as to that charge. But now we are asked to re-open the proceedings and to call upon the magistrate not to adjudicate summarily, and, instead, to take such steps as may lead to prosecution by way of indictment under sec. 595. But it is too late, if it was

ever competent, so to intervene. It is left to the discretion of the magistrate to determine whether or not the case is one to be dealt with summarily upon the consent of the accused, and this he has to determine before the defence has been made: sec. 791. Here defence has been made, the case tried, and the charge dismissed. Section 595, which relates to the preliminary inquiry before the magistrate with a view to subsequent trial before another forum, has no pertinence to this concluded investigation.

I think the magistrate had jurisdiction to try a case of perjury, as my brother Robertson has pointed out: if he had no jurisdiction, the defendant was never in jeopardy, and may still be prosecuted without the assistance of this Court.

*Rule refused.*

[COURT OF APPEAL FOR ONTARIO.]

TORONTO, May 14, 1901.

A MOTION made by way of appeal from the above decision by *Bartram* for the private prosecutor, was refused. (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, JJ.A.)

**Note:** *Evidence to prove perjury—Cr. Code, secs. 146, 684.*

Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding, respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony. *Tascherneau's Criminal Law of Canada*, p. 43. But by statute 32-33 Vict. (Can.), c. 23, s. 7, all evidence and proof whatsoever, whether given orally or by affidavit, etc., was declared to be material with respect to the liability for wilful and corrupt perjury, and that section was incorporated in the Perjury Act (R.S.C. 1886, Ch. 154, sec. 5).

The definition of the term "Perjury" has been extended by the

*Note—Continued.*

"Criminal Code, 1892," so as to apply to a witness giving false evidence, although he was not competent to be a witness (sec. 145 (2)), or, although the evidence was not properly admissible (sec. 145 (2)), or, although the tribunal before which the evidence was given was not duly constituted (sec. 145 (3)), or, although the proceeding in which the false evidence was given was held in a wrong place, or was otherwise invalid (sec. 145 (3)); and evidence given on the *voir dire* and evidence given before a grand jury are expressly included (sec. 145 (1)).

Perjury, under the Criminal Code, is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit, or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by the witness to mislead the court, jury, or person holding the proceeding (Code, sec. 145 (1)). Although an "intent to mislead" is an essential ingredient of the offence, a charge which does not specifically allege such intent may be sufficient if it gives to the accused notice that he is charged with having "falsely, wilfully and corruptly" sworn to, or solemnly declared a statement to the effect and in the words set forth. *Reg. v. Skelton* (1898), 2 N.W.T. Rep. 210, 215; *Reg. v. Dewar*, 2 N.W.T. Rep. 194; Cr. Code, sec. 611 (3).

A false statement, made in a statutory declaration administered under the "Canada Evidence Act, 1893," may be the subject of a charge akin to perjury under Code sec. 147, for the object of the Evidence Act (sec. 26), was to provide a means by which certain statements not authorized to be made on oath could be verified, and the permission thereby granted to certain officials to receive a solemn declaration (sec. 26), must be taken to include authority to the declarant to make a declaration; such cases are therefore brought within the terms of sec. 147 of the Code which provides that "every one is guilty of an indictable offence and liable to seven years' imprisonment who being required or authorized by law to make any statement on oath or affirmation, or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding." *Reg. v. Skelton*, 2 N.W.T. Rep. 210.

By Code sec. 684, no person accused of the offence of perjury under sec. 146, or of certain other offences specified, shall be convicted upon the evidence of one witness, "unless such witness is corroborated in some material particular by evidence implicating the accused, *sed quare*, whether sec. 684 applies to the offence of making a false statutory declaration provided for in sec. 147, the latter section not being referred to in sec. 684.

*Note—Continued.*

Apart from statutory enactment, it was a general rule that the testimony of one witness was insufficient to convict on a charge of perjury. Roscoe's Cr. Evid. 11th ed., 807. It is not, however, imperative that there should be two *witnesses* to disprove the fact sworn to by the accused, for if any other material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *R. v. Lee*, 3 Russell on Crimes, 5th ed., 72. Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to shew that one party is more to be believed than the other. *Reg. v. Boulter* (1852), 5 Cox, C.C. 543; 3 Car. & Kir. 236. And it has been held that a letter written by the accused contradicting his statement upon oath would be sufficient to make it unnecessary to have a second witness. *Rex v. Mayhew*, 6 Carrington & Payne, 315.

If the evidence adduced in proof of the crime of perjury consist of two opposing statements of the prisoner and nothing more, he cannot be convicted; for if only one was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error or a falsehood, though the latter being inconsistent with what he has sworn may form important evidence, *with other circumstances*, against him. 1 Greenleaf on Evidence, 259. And if both the contradictory statements were delivered under oath, there is still nothing to shew which of them is false, where no other evidence of the falsity is given.

If a person swears one thing at one time, and another at another, he cannot be convicted where it is not possible to tell which is the true and which is the false. *R. v. Jackson*, 1 Lewin, C.C. 270, nor is it a necessary consequence that a person has committed perjury when he has sworn on both occasions to conflicting statements, for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. *Ibid*, per Holroyd, J.

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## [SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU, GWYNNE,  
SEDGEWICK AND KING, JJ.

## BIGELOW V. THE QUEEN.

*Liquor license—Statutory restriction of certiorari proceedings—Affidavit  
negating guilt—Jurisdiction of magistrate—Sale of liquor by  
wholesale.*

1. The Liquor License Act of Nova Scotia, 1895, sec. 117, applies to prohibit the granting of a certiorari in respect of any conviction thereunder, unless the applicant makes an affidavit negating the charge as laid in the information; and without such affidavit, the Court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions, and as to whether the conviction which shewed the exact quantity of liquor admittedly sold was not a wholesale transaction.

ARGUED: May 1, 1900.

DECIDED: June 12, 1900.

APPEAL from the judgment of the Supreme Court of Nova Scotia in *The Queen v. Bigelow* (1899) 2 Can. Cr. Cas. 367, vacating the order of RITCHIE, J., for certiorari on a conviction against the appellant, on the ground that the affidavit required by sec. 117 of the Nova Scotia Liquor License Act had not been produced on the application for the writ of certiorari.

OTTAWA, June 12, 1900.

THE COURT (GWYNNE, J., dissenting) dismissed the appeal for the reasons given in the judgment appealed from.

*Appeal dismissed with costs.*

*Borden*, Q.C., for the appellant.

*Longley*, Q.C., Attorney-General for Nova Scotia, for the Crown.

*McLellan*, for the informant.



## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., AND LISTER, J.A., SITTING AS A DIVISIONAL COURT.

## THE QUEEN v. PLAYTER.

*Noxious and offensive business—Nuisance—Private hospital—Consumptive sanitarium—Ejusdem generis rule—Public Health Act (Ont.), R.S.O. 1897, c. 248, s. 72.*

1. The keeping of a house or private hospital for the treatment of consumptive patients is not a business *ejusdem generis* with bone boiling, soap boiling, oil refining, gas manufacturing, or the storing of hides, so as to constitute an "other noxious or offensive trade or business," made an offence against the Public Health Act (Ont.) where done without the consent of the municipality, and this notwithstanding the magistrate's finding that the place is not a sanitarium or hospital in the true sense, but a place of business, and that by reason of the failure to take proper precautions the business had become offensive.

ARGUED: January 14, 1901.

DECIDED: JANUARY 21, 1901.

APPLICATION to quash a conviction made by the police magistrate for Toronto Junction. The conviction was that the defendant, Dr. Edward Playter, did on or about the 14th day of June A.D. 1900, in the township of York, without the consent of the municipality, establish a noxious and offensive trade or business, or that which might become a noxious and offensive trade or business; and that since the said last named date he continued to carry on said noxious and offensive trade or business, after having been duly notified to desist by the local Board of Health of the municipality of the township of York, contrary to the statute, R.S.O. 1897, ch. 248. By sec. 72 of that Act it is enacted as follows:—

"In case a person establishes, without the consent of the municipal council of the locality, any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or refining of coal oil, or extracting oil from fish, or storing

of hides, or soap boiling, or tallow melting, or tripe boiling, or slaughtering of animals, or manufacturing of gas, or *any other* noxious or offensive trade, business or manufacture, or such as may become offensive, he shall be liable to a penalty not exceeding \$250 in respect of the establishment thereof; and any person carrying on a business so established shall be liable to a penalty not exceeding \$10 for every day on which, after notice in writing by the local board, or an officer thereof, to desist, the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof."

The information upon which the conviction was based was laid by the health inspector of the township of York, under instructions from the local Board of Health.

The evidence disclosed that the defendant, who was a physician, had a house, hospital or sanitarium for the treatment of consumptive patients, in the township of York, just outside the limits of the city of Toronto, in a place known as "Moore Park," which had been laid out into lots for residential purposes, and on which a number of valuable residences had been erected, the said house, hospital or sanitarium being one hundred and fifteen feet from one of such residences. There was also a public school about 2,000 feet from the alleged hospital, and the school children going to the east passed by it.

It was claimed that the existence of the said house, hospital or sanitarium was most injurious to the health of the people in the locality, and it depreciated the value of the property surrounding it, as it prevented persons, who would otherwise have done so, from buying property and living there.

TORONTO, January 14, 1901.

*J. T. C. Thompson*, for the applicant: The defendant

does not come within sec. 72 of the Public Health Act, R.S.O. 1897, ch. 248. The principle of *ejusdem generis* applies. The section is one of the sections coming under the subdivision of the Act directed towards nuisances, and deals with matters which are in themselves nuisances. The section enacts that in case any person establishes any offensive trade, that is to say, blood boiling, bone boiling, etc., naming several other offensive trades, and then come the words under which the conviction is made, namely, "or any other noxious or offensive trade, business, or manufacture, or such as may become offensive." These latter words must be limited to a trade, business, or manufacture of a similar character. It clearly does not apply to an institution such as the defendant was carrying on, namely, a hospital or sanitarium. The case of *Wanstead Local Board of Health v. Hill* (1863), 32 L.J. N.S.M.C. 135, which was decided on a similar section in the English Act, is expressly in point. The sections dealing with sanatoria or hospitals are dealt with in secs. 81 *et seq.* of the Act.

*Ritchie, Q.C., and Ballantyne, contra* : This was not a hospital or sanitarium, but a noxious and offensive trade or business, or such as would become offensive, if proper precautions were not taken, and the magistrate has expressly so found. It therefore comes within the class that the section is aimed against. The section in our Act is much wider than that in the English Act. Our Act has the additional words "or such as may become offensive." This distinguishes the present case from that of *Wanstead Local Board of Health v. Hill*, also reported in 13 C.B.N.S. 479. The magistrate had jurisdiction therefore to try the case, and having found on the evidence before him that the place was not a hospital or sanitarium, but the carrying on of a trade or business which, by reason of proper precautions not having been taken, had become an offensive

trade or business within the meaning of the section, the Court will not interfere.

*Thompson*, in reply: The magistrate could not give himself jurisdiction to try the case by finding that the institution was a "noxious or offensive business." This is a matter of law and not of fact, and therefore certiorari is not taken away, and the Court may interfere.

TORONTO, January 21, 1901.

The judgment of the Court was delivered by

BOYD, C.—

This conviction purports to be under sec. 72 of the Public Health Act, R.S.O. 1897 ch. 248. The conviction finds that the defendant did, without the consent of the municipality, establish a noxious and offensive trade or business at the township of York. The complaint was that the defendant, a physician, kept a house or hospital for the treatment of consumptive patients. The magistrate finds that the institution is a place of business, and that it is not a sanitarium or hospital in the true sense, and that it would be noxious or offensive if proper precautions were not taken, and that proper precautions were not in fact taken.

The original of sec. 72 above is the Imperial Act, 38-39 Vict. ch. 55, sec. 112 (1875), which is based on the earlier English Act of 11-12 Vict. ch. 63 (1848). Our section is like that in the Act of 1875, with the addition of some other named offensive trades. Our Act also has after "any noxious or offensive trade, business, or manufacture," these new words, "*or such as may become offensive.*" In commenting on the Act of 1848, Erle, C.J., said, in *Wanstead Local Board of Health v. Hill*, 13 C.B.N.S. 479, at p. 482: "All the trades mentioned specifically

deal with substances which are or must necessarily become in themselves offensive." And Willes, J., said, at p. 483: "It is necessary to be extremely cautious in construing this Act, whereby trades are brought within the jurisdiction of the justices." Upon the later Act it was held in *Withington Local Board of Health v. Corporation of Manchester*, [1893] 2 Ch. 19, that a temporary smallpox hospital was not a noxious or offensive business within the meaning of the section in hand.

That decision proceeded upon two grounds both here applicable:—First, that the carrying on of a smallpox hospital, though it might be called a business, was not analogous to any of those specified; and second, that by the collocation of the sections, it was manifest that the earlier sections relating to "offensive trades" were segregated from those relating to hospitals and infectious diseases.

This is noticeable in the Ontario revision; secs. 63 to 80 fall under the head "nuisances, etc.," and from 81 a new group begins headed "infectious diseases and hospitals."

These two reasons, the *ejusdem generis* doctrine and the legislative grouping of the sections, are, to my mind, conclusive against giving such an extended meaning to the words found in our Act, "*or such as may become offensive*," as would embrace the sort of work being carried on by the defendant. Other objections, some of which look formidable, were also discussed, but I prefer to place my judgment on the broad ground of want of jurisdiction in the premises.

The conviction should be quashed; no action and no costs.

*Conviction quashed.*

## [COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

## THE KING v. BARSALOU (No. 1).

*Impanelling the jury—Challenge—Direction to “stand by”—Time for application.*

1. A direction to a juror to “stand by” at the instance of the Crown is in substance a deferred challenge for cause, and cannot be made after the juror has, by direction of the Clerk of Assize, taken the book to be sworn.

DECIDED: March 14, 1901.

IN proceeding to impanel the Petit Jury, a juror named John McCandless was called and entered the jury box. No challenges were tendered, and the juror was directed by the Clerk of the Crown to take the book; he did so, and the Clerk began to put the oath in English, when the juror requested that the oath should be put in French, as, notwithstanding his Scotch name, that was the language which he spoke. The Crown Prosecutor then asked that the juror should be ordered to stand by, but the counsel for all the defendants objected, alleging that it was too late to do so as the juror had taken the book by direction of the Clerk of the Court.

MONTREAL, March 14, 1901.

WÜRTELE, J.—

To decide the question raised, we have to see what is the nature of the proceeding directing a juror to stand by

When jurors are called from the panel to form a Petit Jury, the Crown on the one hand and the defendants on the other hand are entitled to a certain number of peremptory challenges and to any number of challenges for cause. When the accused does not challenge, the Crown may either challenge peremptorily, or may challenge for cause, or direct the juror to stand by. The direction to stand by is really a challenge by the Crown for cause without it being necessary to shew and establish the ground on which it is founded until the panel has been exhausted without twelve jurors having been accepted and sworn. It is in fact a deferred challenge for cause; and the term "to stand by" means that the Crown shall have time to shew the cause of challenge. In the case of *Regina v. Leach*, 9 C. & P. 499, Baron Parke said: "The Crown may challenge without shewing cause till the panel is gone through, and then if there is not a full jury they must shew cause. The order to stand by means that on the prayer of the counsel for the Crown, a juror shall stand by until the time when it becomes incumbent on the Crown to shew cause of challenge."

Then in Stephens' Criminal Procedure, at page 186, we read: "The prosecutor need not shew the cause of any challenge for the Crown until the whole of the panel has been gone through, and he may require any juror whom he challenges for the Crown to stand by, that is to say, to wait till all the jurors available at the time when the panel is called over have been called. If a full jury is not then sworn, the prosecutor must shew the cause of his challenge for the Crown, and if he fails to do so, the jurors challenged for the Crown must be sworn." (See also Harris, 8th ed., page 380, and Shirley on Criminal Law, page 112.)

The panel having been gone over without a jury having been procured, the practice is to call over those who were directed to stand by in the order in which they were drawn, and then for the Crown Prosecutor to state the Crown's cause of challenge; if the ground of challenge is not allowed and the juror is not challenged by the accused, he is sworn. If, however, when the panel has been exhausted, jurymen who had made default or who were impanelled on another Petit Jury, become available, the names of such jurymen should be put in the box and drawn out, and such jurors should be challenged, be ordered to stand by or be sworn, before the jurors originally ordered to stand by are again called. Criminal Code, sec. 667 (4). The direction to stand by is practically a challenge for cause, and such being the case, the order to stand by must be given at a time when a challenge could be made. The right to challenge must be exercised before the juror has taken the book, by direction of the Clerk of the Court, to be sworn, and sufficient time is always allowed before this order is given to allow the parties to exercise the right of challenge. After the book has been taken, the taking of the oath is deemed to have commenced, and it is then too late to challenge, and also to direct the juror to stand by. In the case of *Regina v. Frost*, 9 C. & P. 129, Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the Court to do so."

The juror in this instance having taken the book by direction of the Clerk of the Court, and the latter having commenced to recite the words of the oath, before any challenge was made or any direction to stand by was



given, it was too late to do so. I therefore maintain the objection, and I order the Clerk to proceed to administer the oath to the juror.

*O. Desmarais, K. C., and J. P. Cooke, K. C., Crown Prosecutors.*

*H. C. Saint Pierre, K.C., and M. P. Durand, for the defendant Barsalou.*

*J. A. St. Julien, and J. C. Walsh, for the defendant St. Pierre.*

*J. E. A. Geoffrion, for the defendant Pelletier.*

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## [COURT OF KING'S BENCH, QUEBEC.]

CROWN SIDE.

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

## THE KING V. BARSALOU (No. 2).

*Evidence of motive—Proof of immoral relationship—Admissibility—Evidence of bad character—Cross-examination of defendant's witnesses called to prove good character.*

1. Where the question of motive is an important element in the case, and the motive charged depends on the alleged improper relations of the accused with a certain female, evidence is admissible to prove such relations, although it tends to shew that he is of bad character, and notwithstanding the general rule which prevents the prosecution from adducing evidence of the general bad character of the accused as a circumstance in proof of the charge.
2. Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge.

MONTREAL, March 18, 1901.

WÜRTELE, J.—

The defendants are charged with having on the 12th February, 1901, set fire to a substance in a building on St. James Street, in the city of Montreal so situated that they knew that the building was likely to catch fire. It has been proved that the house in question had been leased to the female defendant, Bertha St. Pierre, and that her co-defendant, David Barsalou, had been present when she leased it, and had supplied \$1 on account of the rent; that she had stored furniture in the house, and that David Barsalou had assisted her in moving it; that the lower storey of the house and the furniture had been saturated with varnish and benzine, and that David Barsalou had

bought, some days before the alleged offence, five gallons of varnish and one gallon of benzine. Emile Filion, one of the witnesses for the Crown, has been asked the following questions :

R. Je devais du loyer à Madame Cougeon, et là, j'ai demandé à Mr. Barsalou à qui je devais payer.

Q. Quelle était l'affaire de Mr. Barsalou, quelle relation avait-il là ?

R. C'était dans le déménagement et Madame Cougeon était malade ; elle était dans un autre appartement.

Q. Savez-vous les relations qui existaient entre Mr. Barsalou et Madame Cougeon ?

The counsel for David Barsalou objects to the last question on the ground that it tends to prove facts which would affect his general character and reputation, and that such evidence is consequently inadmissible in like manner as direct evidence as to general bad character itself would be.

In criminal prosecutions evidence respecting the general character of the defendant is admissible for the purpose of raising a presumption of innocence or of guilt, but the party who tenders such evidence must restrict himself to evidence of mere general reputation, and the question to be put to a witness to character is : What is the defendant's reputation for honesty, morality or humanity ? as the case may be. The Crown has no right, however, in making out its case to put in evidence of bad character, but, on the other hand, the defendant is at liberty to give evidence of his general good character ; and then the counsel for the Crown can cross-examine the witnesses as to particular or isolated facts and as to the ground of their belief, and may also call witnesses to prove the general bad reputation of the defendant, and thus to contradict his witnesses.

The general rule is that it is not admissible for the prosecution in making out its case to prove facts not directly connected with the offence charged against the defendant which are of a nature to impair his general character or reputation, but to this general rule there are exceptions under certain circumstances.

One of these exceptions is that when any act done by any person is either a fact in issue, or is relevant to the issue, any fact which supplies a motive for such act is relevant, and proof of it is admissible even if such fact should tend to affect and damage such person's good character: Stephen's Digest of the Law of Evidence, article 7. While the law does not allow evidence of general bad character to be adduced in the first instance as a criminative circumstance, whenever it is necessary to prove a motive on the part of the defendant to commit the offence charged, it is competent to prove particular facts which are of a nature to shew a motive, even when they may injuriously affect his reputation, and the reason is that proof of the existence of a motive is not in itself a criminative circumstance but is only a circumstance which tends to remove the improbability of the act which has been proved to have been done having been done without criminal intent. To quote from Best on Presumptions, page 310: "A motive may, under peculiar circumstances, become an exceedingly important element in a chain of presumptive proof, as . . . where a man, accused of the murder of his wife, has previously formed an adulterous connection with another female. On the other hand, the absence of any apparent motive is always a fact in favour of the accused."

I refer on this subject to Chamberlayne's Edition of Best on Evidence, sec. 453.

It is alleged that the purpose of the projected fire was to enable the female defendant, Bertha St. Pierre, to

fraudulently obtain the amount of an insurance effected on the furniture which she had stored in the house, and to establish a motive for the conduct and acts of David Barsalou which I have mentioned as having been proved, the counsel for the Crown desire to prove the relations which existed between the woman Bertha St. Pierre and David Barsalou. Under the principles which I have enunciated I believe such evidence to be admissible, and I, therefore, overrule the objection and allow the evidence to be given.

*Objection overruled.*

*Desmarais, and Cooke, for the Crown.*

*Saint-Pierre, Durand, Saint-Julien, and Walsh, for the defendants.*

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[COURT OF GENERAL SESSIONS, COUNTY OF  
YORK, ONTARIO.]

BEFORE HIS HONOUR JOSEPH E. McDOUGALL, COUNTY JUDGE AND  
CHAIRMAN OF SESSIONS.

**THE QUEEN v. MUNSON.**

*Pawnbroker—Exercising trade of, without license—"Pawn, pledge or exchange"—Sale with agreement for repurchase at advanced price—Right of property passing to purchaser—Pawnbrokers Act (Ont.), R.S.O. 1897, c. 188, s. 1.*

1. A transfer of both the possession and the right of property in goods under an agreement with the buyer to purchase them back from him at an increased price within a limited time, is not a transaction of "pawn, pledge or exchange for the repayment of money lent," and is not subject to the provisions of the Pawnbrokers Act of Ontario.
2. A person making a business of purchasing goods under a contract whereby he gives to the seller a right of repurchase at an increased price, does not thereby exercise the trade of a pawnbroker.

DECIDED: January 9, 1900.

Appeal by Charles Munson, the defendant, from a conviction made against him on October 2, 1899, by the Police Magistrate of Toronto, for having carried on the trade of pawnbroker without the license by law required.

The defendant was a bicycle dealer in the city of Toronto, and bought and sold second-hand bicycles under a form of written contract signed by the customer, as follows:

"I hereby certify that I am of the full age of twenty-one years, and reside at

"That I am the owner of                      bicycle, No.     ,  
and that there is no charge, lien or incumbrance of any  
kind against the same. That in consideration of the sum  
of \$     now paid me, I hereby sell the said wheel to  
Charles Munson, and the said Charles Munson hereby agrees

Sec. 1 of the Ontario statute, R.S.O. c. 188, is the same as the provision contained in the English statute 25 Geo. III. c. 48. Under that Act a class of unlicensed shops known as "leaving shops" arose, in which money was advanced by way of sale and resale, and as such transactions were not covered by 25 Geo. III. c. 48, an amendment

was made by 18 and 19 Vict. (Imp.) c. 27, s. 1, and 35 & 36 Vict., (Imp.) c. 93, under the latter the term pawn-broker was declared to include "every person who carries on the business of taking goods and chattels in pawn" (sec. 5); and sec. 6 provided as follows: "In order to prevent evasions of the provisions of this Act the following persons shall be deemed to be persons carrying on the business of taking goods and chattels in pawn: Any person who keeps a shop for the purchase or sale of goods by way of security for money advanced thereon, and who purchases or receives or takes goods or chattels, and pays or advances or lends thereon any sum of money not exceeding £10, with or under an agreement or understanding express or implied or to be from the nature and character of the dealing reasonably inferred, that these goods may be afterwards redeemed or repurchased on any terms; and every such transaction, article, payment, advance and loan, shall be deemed a pawning, pledge or loan, respectively within this Act."

No such legislation has been passed in Ontario, and our Act has remained subject to the defects of the English statute, 25 Geo. III. c. 48.

*Curry*, for the prosecutor, contra.

TORONTO, January 9, 1900.

THE COURT held that the transaction was not one of pawn or pledge for money lent, and that it was not reached by the Ontario statute, and allowed the appeal, but without costs.

*Conviction set aside.*

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF BEAUHARNOIS.

BEFORE BÉLANGER, J.

## CANADIAN SOCIETY v. LAUZON.

*Summary convictions—Dismissal of complaint—Information by agent of a society—Cruelty to animals—Notice of appeal in name of the society—Service of notice on justices for respondent—Irregularity—Quashing appeal—Cr. Code, secs. 512, 880 (b)—Code Form NNN.*

1. Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge.
2. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed.
3. Where a notice of appeal under the summary convictions clauses is served on the justice who tried the case, instead of on the respondent, it must shew on its face that it is so served on the justice for the respondent.

DECIDED: April 1, 1899.

On the 5th day of April, 1898, one John E. Fletcher, designating himself as an "inspector for the Canadian Society for the Prevention of Cruelty to Animals," laid a complaint before a justice of the peace for the District of Beauharnois charging Amédée Lauzon, the defendant, with ill-treatment of a horse. The charge was investigated at a hearing before two justices of the peace who dismissed the same and gave the following certificate:

"Be it remembered that on the fifth day of April, one thousand eight hundred and ninety-eight, information was laid and complaint made before the undersigned Daniel Shanks, a justice of the peace in and for the said District of Beauharnois, for that 'Amédée Lauzon, of the parish of

St. Malachie of Ormstown, in the said district, yeoman, did, at the said parish of St. Malachie de Ormstown, on or about the twenty-ninth day of March last (1898) wantonly, cruelly, unnecessarily beat, abuse, ill-treat, and torture his own horse, causing it to suffer death by his ill-treatment and unnecessary cruelty, and now at this day, to wit: on the twelfth day of the said month of April (1898), to which day the hearing of this case was duly adjourned, of which the said Amédée Lauzon had due notice, both the said parties appear before the undersigned, two of Her Majesty's justices of the peace in and for the said District of Beauharnois, in order that we should hear and determine the said information and complaint; whereupon the matter of the said information and complaint being by us duly considered, it manifestly appears to us that the said information and complaint is not proved; we do therefore dismiss the same, and do adjudge that the said complainant, John E. Fletcher, of the City and District of Montreal, inspector for the Canadian Society for the Prevention of Cruelty to Animals, to pay to the said Amédée Lauzon the sum of \$3.45, for his costs incurred by him in defence in his behalf; and \$10.30 costs incurred on behalf of the said complainant, of which latter sum the amount of \$1.90 has been paid, and if the said several sums, to wit: the total sum of \$11.85 as balance of said costs, is not paid forthwith, we order the same to be levied by distress and sale of the goods and chattels of the said John E. Fletcher, and in default of sufficient distress in that behalf we adjudge the said John E. Fletcher to be imprisoned in the common gaol of the said District of Beauharnois at the town of Beauharnois, in said District of Beauharnois, for the term of fifteen days, unless the said sum for costs, and all costs and charges of the said distress and of the commitment and conveying of the said John E. Fletcher to the said common gaol are sooner paid.

"Given under our hands and seals this eighteenth day of April, in the year one thousand eight hundred and ninety-eight, at Huntingdon village, in the district aforesaid.

"(Signed),

"DANIEL SHANKS, J.P.

"W. S. MACLAREN, J.P."

The respondent had left the country and could not be served, but on the 22nd of April, 1898, the justices were served with a notice of appeal as follows :

"Province of Quebec, District of Beauharnois, Court of Queen's Bench (Crown Side).

"The Canadian Society for the Prevention of Cruelty to Animals (prosecutrix in Court below), appellant *v.* Amédée Lauzon (defendant in the Court below), respondent.

"To W. S. Maclaren and Daniel Shanks, of the village of Huntingdon, in the District of Beauharnois, justices of the peace for the said district.

"Take notice that the Canadian Society for the Prevention of Cruelty to Animals of the City and District of Montreal, intends to enter and prosecute an appeal at the next session of the Court of Queen's Bench for the District of Beauharnois, sitting as a Court of criminal jurisdiction, to be held in Beauharnois, said district, against a certain judgment bearing date on or about the twelfth day of April instant (1898), rendered by you, W. S. Maclaren and Daniel Shanks, justices of the peace in and for the said District of Beauharnois, whereby the said society's action against one Amédée Lauzon, of Ste. Malachie d'Orms-town, in the District of Beauharnois, for having killed his horse, said action bearing the number 80 of the records of the magistrate's court for the District of Beauharnois, was dismissed with costs against the prosecutrix.

"Dated at Beauharnois, this twenty-first day of April, one thousand eight hundred and ninety-eight.

"(Signed),

"The Canadian Society for the Prevention  
"of Cruelty to Animals, per

"G. DURNFORD, Secretary.

"(Signed),

"MCGIBBON, CASGRAIN, RYAN & MITCHELL,

"Attorneys for appellant."

It also appeared that the respondent's attorney was aware of the service of the notice.

BEAUHARNOIS, QUE., April 1, 1899.

THE COURT held that John E. Fletcher, the informant and prosecutor before the justices, was alone entitled to take an appeal from the certificate dismissing the charge; and that the Canadian Society for the Prevention of Cruelty to Animals had no *locus standi* to present the appeal, as the society was not a party to the proceedings before the justices.

It was also held that sec. 880 (b) of the Criminal Code had not been complied with, inasmuch as the respondent, the defendant below, had not been served with any notice of appeal, nor had notice been served on the justices *for him* (Cr. Code 880 (b),) the notice served being directed to the justices alone instead of specifying on its face that it was intended for the respondent as sub-sec. (b) requires. The respondent was, therefore, not legally called upon to answer the appeal, and the same was, therefore, quashed.

*Appeal quashed.*

*McGibbon, Casgrain, Ryan & Mitchell* for the appellants.

*J. K. Elliott, Q.C.* and *C. A. Corneillier, Q.C.*, for the respondent.

[COUNTY COURT, UNITED COUNTIES OF NORTH-  
UMBERLAND AND DURHAM, ONTARIO.]

BEFORE BENSON, Co. J.

**THE KING v. LIGHTBURNE.**

*Liquor license — Unincorporated club — Intoxicating liquors for use of members only — Proof of consumption of liquor on club premises — Statutory effect of — Meaning of "conclusive" evidence — Constitutional law — Validity of quasi-criminal legislation of province — Liquor License Act, R.S.O., 1897, c. 245, s. 53.*

1. An unlicensed person who, as a member of an unincorporated club, purchases with the funds of the club a supply of intoxicating liquors for the use of the members, each of whom, although at liberty to help himself, was to contribute to the keeping up of the fund in proportion to what he used of the supply, is guilty under the Ontario Liquor License Act of the offence of unlawfully keeping liquor for sale.
2. Proof of the consumption of liquor in the premises occupied by a society association or club within the provisions of sec. 53 of the Ontario Liquor License Act, by any member thereof, constitutes incontrovertible evidence of the sale or keeping for sale of such liquor, and the effect of sec. 53, sub-s. 3 which declares that such proof shall be "conclusive evidence" of sale, and that "any member of the club, etc., shall be taken conclusively to be the person who keeps such liquors for sale," is to debar any member of the club against whom the charge is laid, from showing the contrary.
3. Such enactment is intra vires of the Provincial Legislature.

COBOURG, March 27, 1901.

BENSON, Co.J.—

THIS is an appeal under sec. 118, sub-sec. (6), of the Liquor License Act, R.S.O., ch. 245 (by direction of the Attorney-General) by James Bulger, a License Inspector, against an order made by the police magistrate for the town of Cobourg, dismissing an information laid by the appellant against the respondent, Philip J. Lightburne, for a contravention of the provisions of the Act by unlawfully keeping in his premises, known as the "Horton Block," liquor for sale without the license therefor by law required.

The prosecution is under sec. 53 of the Act, relating to clubs.

The material facts of the case, as proved by admissions and evidence, are these :—The respondent was, at the time of the alleged contravention of the law, the president and a member of a club, association, or society, called the "Cobourg Whist Club," which consisted of thirteen members. The club rented a room in the Horton block from the respondent, as agent for his wife (who was the owner), and used this room for the purposes of its meetings. No person, except members of the club, had any right to use the room. Each member, upon joining, was furnished with a key to the room, and so had access to it. There were no rules or regulations in writing, but on the formation of the club it was agreed between the members that all should contribute to a fund for the purchase of spirituous liquors and ale and cigars, and that out of that fund the respondent, as president, should procure and keep in the room a supply of liquors, ale and cigars, for use and consumption by members, and that he should have the control and care of these supplies. These contributions were made, and the respondent procured a supply of liquors, ale and cigars, which was kept by him in the club's room. The members who chose to do so used those supplies. There was evidence that each member could help himself and pay for what he used, and other evidence was that the money contributed by those who used the supplies was to go to the fund for the purpose of renewal supplies. The club was not incorporated, and neither the club or any member of it was licensed under this Act. It is clear that on the occasion of the alleged contravention, liquor was kept by the respondent, as president of the club, in the club's room, for intended consumption by the members of the club, and was, in fact, consumed by the

members of the club, and that some members put money in the place appointed for its reception, as their contributions to the liquor fund.

It is contended for the respondent that there was no keeping of liquor in the room for sale or barter, and so no violation of the Act; that there could be no sale, as the liquor belonged to the club, and one member could not sell to another. *Graff v. Evans*, L. R. 8 Q. B. D. 373, and *Newell v. Hemmingway*, 58 L.J.M.C. 47, are relied on. I have not been referred to, nor have I found, any case decided upon the provisions of sec. 53 of the Act as they now exist. *Reg. v. Austin*, 17 Ont. R. 743, was a decision under sub-sec. 1 of sec. 53 in its old form, when its application was to a club formed or carried on specially or chiefly for the purpose of enabling it to sell the liquor to its members or to others without a license, and so as by means of such organization to evade the operation of the Act, and the magistrate having found that the club had been formed or carried on chiefly or specially for the purpose mentioned, the court refused to disturb the conviction. In that case, MacMahon, J., refers to the cases of *Graff v. Evans*, and *Newell v. Hemmingway* and says they are of little value in determining the question to be decided under the special enactment of sec. 53. The defendant in that case was the secretary and treasurer of the club (which was incorporated), and was found in the club rooms when the inspector, who laid the information, visited them and found a counter with glasses, bottles and a large quantity of beer, lager beer, whisky, gin, etc., and MacMahon, J., thought there was ample proof of "intended consumption of liquor in such premises" "by the members of the club," so as to make the defendant liable, as a member of the club, to be held "to be the person who has or keeps therein such liquor for sale or barter," within the

meaning of sub-sec. 3 of sec. 53. In the case I am considering, it is clear that there was both "consumption" and "intended consumption" of liquor, in such premises, by such members of the club.

The case of *Reg. v. Hughes* (1898), 2 Can. Cr. Cas. 5, does not afford assistance in this case, as it proceeded upon the ground that the defendant, though steward of the club, was really keeping liquor on his own account, as the club was prohibited from selling it by its charter. It is important here, though, as shewing that the word "keeping" does not necessarily imply property, but may signify share of government or control. Per Boyd, C., at p. 19. *Reg. v. Slattery*, 26 Ont. R. 148, is not an authority here, as the club in that case, of which the defendant was manager, was incorporated under the Ontario Joint Stock Companies Letters Patent Act, and the provisions of sec. 53 of the Liquor License Act, then R.S.O. (1887) ch. 194, were not applicable to such a club. Nor is *Reg. v. Charles*, 24 Ont. R. 432, in point, for the same reason.

I have, therefore, to dispose of this appeal without the aid of any direct authority. Section 53 of the Liquor License Act, R.S.O. ch. 245, applies to any unincorporated society, association, or club, and therefore, to the Cobourg Whist Club. The second sub-section of sec. 53 makes the keeping or having in any room or place occupied or controlled by such club, association, or society, or any member or members thereof, or by any person resorting thereto, of any liquor for sale or barter, a violation of section 50 of the Act. Then sub-sec. 3 enacts that proof of "consumption or intended consumption of liquor in such premises by any member of such club, association, or society, or person who resorts thereto, shall be conclusive evidence of sale of such liquor, and the occupants of the



premises, or any member of the club, association, or society, or person who resorts thereto, shall be taken conclusively to be the person who has or keeps therein such liquor for sale or barter."

It was contended on behalf of the defendant that though there was proof of consumption of liquor in the premises by members of the club on the occasion complained of, it was still open to the defendant to shew that the liquor was not kept there for sale or barter, and that he, though a member of the club, did not have or keep the liquor therein for sale or barter; and that, under the facts as proved, there was in fact no sale or barter of the liquor. In my opinion he is not at liberty to shew this, in the face of the enactment contained in these subsections. Under them, proof of consumption of liquor on the premises of the club by a member of the club, is made *conclusive* evidence of the sale of the liquor, and the defendant, as a member of the club, must be taken conclusively to be the person who keeps therein the liquor for sale. There seems to me to be no escape from this conclusion, and I do not think it is open to the defendant to controvert it. "Conclusive evidence" is thus defined in Stroud's Judicial Dictionary: "Anything which is duly prescribed as "conclusive evidence" of a fact, is absolute evidence of such fact, as well criminally as civilly for all purposes for which it is so made evidence," and in support of this definition are cited the cases of *Reg. v. Levi*, 34 L.J.M.C. 174, and *Reg. v. Robinson*, L.R. 1 C.C. 80. These were both cases under the Bankruptcy Act, 12 and 13 Vict. ch. 106, sec. 233, which enacted that the Gazette containing the advertisement of the adjudication of bankruptcy should be conclusive evidence in all cases against the bankrupt, of the adjudication. The court held, that

notwithstanding any irregularities there might have been, which otherwise would have invalidated the adjudication, the advertisement in the Gazette concluded the matter.

In a case of *In re Brynmawr Coal Co.* W.N. (1877) 45, it was held that as sec. 51 of the Companies Act, 1862, made the declaration of the chairman that the voluntary resolution of the company for liquidation had been passed, conclusive evidence of the fact, it could not be shewn (though the fact was so) that there was not a majority, in accordance with the statute, of votes present. It was so held also in the *Gold Company's Case*, 11 Ch. D. 701, more fully reported in 48 L.J., Ch. 281, and in the case of *In re Hadleigh Castle Gold Mines*, [1900] 2 Ch. 419.

I am, therefore, of opinion that the defendant must be convicted of a violation of sec. 50 of the Liquor License Act.

I am unable to agree with the contention on the part of the defendant that these provisions of the sub-sections of sec. 53 are ultra vires of the Legislature of Ontario. They are not, in my judgment, any greater interference with, or restrictions upon, the liberty of the subject, than many other provisions of the law which have been held to be intra vires. It was argued that the penalty applicable to this case is that prescribed by section 72 of the Act, but I do not think so. The penalties under that section are not applicable to violation of sec. 50, but are confined to violation of section 49, the selling of liquor. Section 86 provides the penalty for such a case as this, and that penalty is directed to be for the first offence, not less than \$20, besides costs, and not more than \$50 besides costs. As I believe that the defendant had no intention of violating the law, and acted in ignorance that he was doing so, I think that I should impose the lowest penalty,

and so I direct that he shall forfeit and pay a penalty of \$20, besides costs.

*Appeal allowed and defendant convicted.*

*McColl*, for appellant.

*Armstrong*, for respondent.

**Note:** *Clubs and the Liquor License Law.*

By the Ontario Liquor License Act, R.S.O. 1897, ch. 245, sec. 53, any society, association or club incorporated under the Benevolent Societies' Act, and any unincorporated society, association or club, or any member, officer, or servant thereof, or person resorting thereto, who shall sell or barter to any member thereof or to any other person without a license shall be held to have violated sec. 49 of the Liquor License Act.

Section 49 provides that "no person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors without having first obtained a license under this Act authorizing him so to do."

The usual defence set up by clubs, is that there is no "sale" of the liquor to the member, that when he is supplied by the steward or other officer for a consideration, no "sale" takes place, but a mere distribution of the liquor among the members by previous arrangement under the rules of the club.

In *Graff v. Evans*, 8 Q.B.D. 373, Graff was the manager of the Grosvenor Club, the objects of which were social intercourse, mutual and moral improvement, aided by lectures and rational recreation. The club was an ordinary unincorporated club, the business of which was managed by a board of trustees in whom, for the purposes of the club, their property was vested. The evidence shewed that Foster, a member of the club, purchased at the bar of the club a bottle of whiskey and a bottle of pale ale and paid for the two. The question submitted to the Court was whether the "sale" to Foster was a sale within the meaning of sec. 3. The Court held that Foster, as a member of the club, was an owner of the property of the club in common with all the other members; that had he refused to pay he could not have been sued for the price as for goods sold and delivered; that the transfer of the liquor to him was not a "sale," and the conviction was quashed. It was further observed that the Licensing Act was never intended to apply to clubs. This last observation could not be made with reference to our License Act in view of sec. 53, which is not to be found in the English Act.

In *Newell v. Hemmingway*, 58 L.J.M.C. 46, Newell was the manager of the Dumfries Club Co., Limited, an incorporated club, and supplied liquor to a member. It was held in this case that such a transaction

**Note—Continued.**

was not a "sale" within the meaning of the Act. One of the learned Judges said: "If there is a sale at all it is certainly not a sale by the manager of the club to the members, whose servant he is." So that at most this case only decides that if there was a sale it was not the sale of the servant and that the prosecution was not directed against the real offender.

One of the latest English cases on this subject is *Bowyer v. The Percy Supper Club Co. Limited*, [1893] 2 Q.B. 156. The club on this occasion was an incorporated company registered under the Companies Act, and was established to carry on and maintain a proprietary club for the accommodation of the shareholders of the company and their friends. The club was under the management of a committee of members. The club-house and furniture and the liquors were the property of the company and not of the club members. A sale of liquor similar to that in *Graff v. Evans* was held to be an infraction of the Act. The Court held that the disposition of or transaction in liquor was a sale by the club to its member, and not a distribution as in *Graff v. Evans*.

In considering the cases decided under the English Act it must be borne in mind that the English Act differs very materially from the Ontario License Act. While sec 49 of the Ontario Act forbids the sale of liquor without license in almost the same terms as sec. 3 of the English Act, there is no section in the English Act corresponding to sec. 53 of our Act, nor is there any section corresponding to our sec. 112, as to the liability of "occupants."

Section 53 was first introduced into the License Act in 1884 by 47 Vict. ch. 34, sec. 9, and applied only to clubs "which had been or might be formed or carried on specially or chiefly for the purpose of selling, bartering or supplying, or of enabling any such society, association or club to sell, barter or supply liquor to the members thereof or to others without a license under this Act and so as by means of such organization to evade the operations of this Act." The words quoted were, however, struck out by 53 Vict. ch. 56, sec. 4 which left the section as it stands at present much enlarged in its scope and effect.

The words "*sell or barter to any member*" used in sec. 53 appear to have a wider and more extended meaning than in sec. 49, and are intended to cover the usual method whereby a club disposes of liquors to its members.

*Reg. v. Austin*, 17 Ont. R. 743, was decided under sec. 53 as it stood before the amendment and supported the decision of the magistrate that the special or main object of the club was to evade the License Act and supply liquor to its members, but the decision clearly recognises that the transaction in supplying liquor to a member is a "sale" within the

**Note—Continued.**

meaning of sec 53, for "sale or barter" and keeping for "sale or barter" are the only offences referred to in the section, and unless what was done constituted a "sale or barter" there could be no offence under the statute, whatever the special or chief object of the club might be.

In *Reg. v. Charles*, 24 Ont. R. 432, the defendant was convicted of unlawfully keeping liquor for sale or barter without a license. The Court sustained the conviction, thereby recognizing that supplying members is a sale within the meaning of sec. 53.

It is, however, submitted that the learned County Judge has placed too strict an interpretation upon the word "conclusive" as used in sub-sec. 3 of sec. 53. The sub-section is, no doubt, inartistically drawn, but it must be construed strictly as a penal enactment. Had it been intended to make liable to prosecution *any* member of a club in which liquor was consumed, regardless of the fact of the member's absence from the club or even from the country, it is fair to assume that a clearer phraseology would have been used. The three sub-sections must be read together. By the first, the club's officer, member or servant who sells or barter liquor is made liable as for an illegal sale, and by the third, proof of consumption at the club premises is conclusive evidence of sale, *i.e.* against the club's officer, etc., who has sold or bartered as those terms are used in sub-sec. 1. Sub-sec. 2 merely extends the operation of sec. 50 as for "keeping for sale" to the case of keeping liquor at premises occupied by a club, and the second part of sub-sec. 3, it is submitted, can only apply to incriminate the person (whether member, servant or officer of the club) in whose control, custody or possession the liquor is kept for the purpose of illegal sale or disposal, on proof of which the statute debars him from saying that his possession was merely the possession of the club, and that the club and not he was the "keeper." He is then, whether a member, an occupant of the premises or a resorter, to be "taken conclusively" to be the person who has or keeps the liquor for sale.

For other cases regarding clubs and the liquor laws *vide Ex parte Coulson*, 1 Can. Cr. Cas. 31 (N.B.), and *R. v. Hughes*, 2 Can. Cr. Cas. 5 (Ont.)

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, WETMORE, MCGUIRE AND  
SCOTT, JJ.

**SIMINGTON v. COLBOURNE.**

*Liquor license ordinance—Conviction involving forfeiture of license—Appeal therefrom—Effect thereof upon forfeiture—Criminal Code, s. 880, 885, 899.*

1. Where a licensee is convicted under sec. 122 (3) of "The Liquor License Ordinance" (N.W.T.) of supplying liquor to an interdicted person with a knowledge of such interdiction, the effect of such conviction being that his license shall be forfeited, an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction.
2. The giving of a recognizance under Cr. Code sec. 880, on an appeal from a summary conviction, operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from.

ARGUED : June 4, 1900,

DECIDED : July 21, 1900.

THIS was a case stated by a Justice of the Peace under the provisions of sec. 900 of the Criminal Code for review by the Honorable Mr. Justice Richardson and by him referred to the court en banc.

The information alleged that Colbourne on April 27th, 1900, did unlawfully sell liquor without a license therefor by law required. Upon the hearing before the Justice of the Peace the following facts were admitted :—

1. On the 28th day of November, 1899, the said Francis Colbourne was the holder of a license for the sale of intoxicating liquors, in the Ottawa Hotel, in the town of Moose Jaw, in the North-West Territories, which

license has not been revoked or otherwise affected except as herein mentioned.

2. On the said 28th day of November, 1899, at Moose Jaw, aforesaid, the said Francis Colbourne was convicted before W. C. Sanders, a Justice of the Peace for the said Territories, for that he, the said Francis Colbourne, on the 31st day of October, 1899, at Moose Jaw, aforesaid, did with the knowledge that the sale of liquor to one John Hawkins was prohibited, sell liquor to the said John Hawkins contrary to the provisions of sec. 122 (3) of "The Liquor License Ordinance."

3. An appeal from said conviction to the Supreme Court of the North-West Territories has been duly entered and is still undisposed of.

4. The said Francis Colbourne did on the 27th day of April, 1900, sell intoxicating liquors at the Ottawa Hotel, in the said town of Moose Jaw.

5. On the said 27th day of April, 1900, the said Francis Colbourne was not the holder of any license for the sale of intoxicating liquors other than the one mentioned in paragraph 1 hereof.

The defendant pleaded guilty for the purposes of this stated case, which recites:—

"By the said judgment the defendant was convicted of the offence charged in the said information on the ground that under the provisions of sec. 122 (3) of "The Liquor License Ordinance" the license of the defendant mentioned in the admissions herein had become by reason of the conviction mentioned in the said admissions on the 28th day of November, 1899, forfeited and void, and therefore the defendant had not the license to sell intoxicating liquors by law required.

The said judgment is questioned on the ground that by reason of an appeal having been entered from the convic-

tion made on the 28th day of November, 1899, mentioned in the said admissions, the forfeiture of the said license did not operate, and that the said license was, on the 27th day of April, 1900, in full force and effect."

*W. B. Willoughby*, for the accused.

The Deputy Attorney-General contra.

CALGARY, N.W.T., July 21, 1900.

WETMORE, J.—

Colbourne, a licensed liquor dealer, having been convicted under sec. 122, sub-sec. 3, of "The Liquor License Ordinance" (Con. Ord. Cap. 89) appealed against such conviction. After so appealing he sold liquors and was charged with selling liquor without a license, it being claimed that his license was under the sub-sec. referred to, forfeited by the conviction just mentioned. Colbourne claims that the appeal has the effect of suspending the operation of the forfeiture. I will deal with this case on the assumption that a conviction under the sub-section in question ipso facto operates to forfeit the license, but I refrain from expressing any decided opinion on that question.

It seems to be quite clear that an appeal would not suspend the right to execution unless there is a provision in the statute under which the conviction is made, providing that it shall effect such a suspension, or the provisions of the statutes are such as to shew an intention to be gathered from them that they shall have that effect. It is contended that sections 880 and 885 of the Criminal Code 1892 (which are applicable to the conviction in question) shew intention that the operation of the conviction shall be suspended until the appeal is decided.



In *Kendall v. Wilkinson*, 4 El. & Bl. 680; 3 C.L.R. 668; 24 L.J.M.C. 89; 1 Jur. (N.S.) 538; 3 W.R. 234. which was an action brought against a Justice of the Peace for causing the arrest of the plaintiff on a warrant issued by him on a bastardy order, the plaintiff having appealed against such order, Campbell, C.J. who delivered the judgment of the majority of the court held that the appeal did not suspend the jurisdiction given to a Justice of the Peace by 7 and 8 Vict. c. 101, s. 3, to grant a warrant against the putative father for the purpose of enforcing payment under the order. That section after providing for the making of an order in bastardy upon due proof and for payments by the putative father went on to provide that "if at any time after the expiration of one calendar month from the making of such order . . . it shall be made to appear to any one justice upon oath or affirmation that any sum to be paid in pursuance of such order has not been paid, such justice may by warrant . . . cause such putative father to be brought before any two Justices," and such Justices were empowered to deal with him as in the section pointed out. Lord Campbell laid it down in 24 L.J.M.C. at p. 91 "there is no universal judicial maxim or rule that an appeal or writ of error is a stay of execution pending the appeal or writ of error," and at p. 92 he states "from the 27th section of the statute 11 & 12 Vict. c. 43 it might be argued that pending an appeal Justices are not at liberty to grant a warrant in execution, as they are thereby expressly authorized to grant the warrant after the appeal is determined, but sec. 35 enacts that the Act shall not extend to any complaints, orders or warrants in matters of bastardy made against the putative father of any bastard child with certain exceptions which do not include the warrant in question." Now, 11 & 12 Vict. c. 43 is a general Act in the nature of what we would

now call a "Summary Convictions Act." Sec. 27 of it contains in substance what is enacted by sec. 885 of "The Criminal Code, 1892." Now what the learned judge might have held were it not for sec. 35 of the Act, one is not prepared to state. Coleridge, J., while he agreed that the plaintiff should be nonsuited, declined to express any opinion as to the effect of the appeal to suspend the issuing of the warrant. He is reported at p. 93 of The Law Journal Report as follows:—"The short point to determine, therefore, is whether on the trial it appeared that what the defendant had done was in the execution of his duty as a Justice of the Peace with respect to a matter within his jurisdiction as such; and as in my opinion this question ought to be answered in the affirmative it seems to me proper to decide the case simply on that ground and not to enter upon other questions which on this supposition it is not necessary now to decide, and upon which after much consideration I entertain very great doubts, both on the principles on which they must stand and the consequence they would involve."

In *Ex parte Wilmott*, 7 Jur. (N.S.) 1053; 1 B & S. 27; 30 L.J.M.C. 161, Wilmott had been convicted under 39 & 40 Geo. III., c. 89, by the captain superintendent of the dock yard of an offence provided for in that statute and sentenced to imprisonment. He appealed from such conviction and applied in a habeas corpus to be discharged from such imprisonment on the ground that the appeal suspended the imprisonment. The applicant was forthwith after the commitment conveyed to prison under a warrant issued for the purpose. The court held that the appeal did not operate as a suspension of the execution. Cockburn, C.J., in giving his judgment refers to sec. 27 of 11 & 12 Vict. c. 43, but expresses the opinion that because the warrant of commitment had been already issued

before the recognizance with a view to the appeal was entered into, 11 & 12 Vict. c. 43 did not apply and was only intended to apply to a case where the proceeding was suspended pending the appeal. Crompton, J., laid it down, 30 L.J.M.C. at p. 164, that "it is clear that there is no suspension of the warrant unless it is clearly so expressed to be. Upon this point I need only refer to *Kendall v. Wilkinson*, 4 El. & Bl. 680."

I am not prepared to agree with this. It is quite doubtful what the decision in *Kendall v. Wilkinson* would have been if sec. 35 of the Act 11 & 12 Vict. c. 43 had not taken the case out of sec. 27. Blackburn, J., lays it down in *Ex parte Wilmott*, 30 L.J.M.C. at p. 165. "I think also that an appeal is given by sec. 21 (of 39 & 40, Geo. III., c. 89) but if that be so, there is still the question whether the appeal would operate as a suspension. Now there is nothing in the Act to shew that this is so, and it is clear from *Kendall v. Wilkinson* that a general right of appeal does not give a suspension of the execution."

I quite agree with that; that general abstract rule is so laid down in *Kendall v. Wilkinson*, but Blackburn, J., proceeds "I do not think that 11 & 12 Vict. c. 43 applied to this case at all, and therefore, it is unnecessary to consider whether by implication the provision in sec. 27 may extend to it." I presume that Blackburn, J. held that 11 & 12 Vict. c. 43 did not apply to the case because the conviction was made by the captain superintendent of the dock yard, and not by a Justice of the Peace. I notice that that point was raised by counsel. It seems to me, therefore, that in cases where there is a section such as sec. 27 of 11 & 12 Vict. c. 43, or 885 of the Criminal Code, the question submitted in the case now before the court has not been by any means satisfactorily settled. In fact it strikes me as being yet very much at large. I can

find no cases that throw any further light upon the subject. Referring to Cockburn, C.J.'s remark in *Ex parte Wilmott* before quoted, that 11 & 12 Vict. c. 43 (I assume he intended sec. 27) was only intended to apply to a case where the proceeding is suspended pending an appeal, I presume by that he does not mean suspended by virtue of an Act or Statute, but suspended because the officer who has the jurisdiction to enforce it has not exercised his powers.

I have already pointed out that sec. 885 of the Code is a provision similar to what is contained in sec. 27 of 11 & 12 Vict. c. 43, but sec. 880 of the Code contains provisions which I cannot find in any of the Imperial Statutes under discussion in the cases I have cited, and upon reading this section with sec. 885 I have reached the conclusion that the appeal referred to in that section does have the effect of suspending the operation of the conviction or order appealed against. In the first place, under par. c. of sec. 880 "the appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given" or he shall give a recognizance with sureties as provided in the paragraph conditional to appear personally at the court to which the appeal is taken "to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court." If the appeal is against any conviction or order for the payment of a penalty or a sum of money, instead of remaining in custody or giving the recognizance, the appellant may deposit with the justice convicting or making the order such sum of money as the justice deems sufficient to cover the sum adjudged to be paid together with the costs of the conviction or order, and the costs of appeal, and "upon such recognizance being given, or such deposit being made,

the justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody." This has all to be done as a precedent to the appeal. The language of the paragraph is imperative, but as soon as the provisions have been complied with, it seems to me to be the clear intention of Parliament that they shall operate as a suspension of the issuing of execution upon the conviction or order. It is clear that it could never have been intended that the party, if he is in custody, being liberated, the justice could turn around and issue a commitment, or that having taken the security provided either by recognizance or deposit, he could turn around and issue either a distress warrant or warrant of commitment. But when we come to the powers of the court of appeal as provided in par. (e) of the same section, the matter seems to me concluded because it is there provided that such court shall "in case of the dismissal of appeal by the defendant and the affirmance of the conviction or order . . . order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order." Now there is no exception to this; it is imperative, and it is to be done in every case where a conviction order is affirmed in the case of an appeal by a defendant. This is entirely inconsistent with any power in the justice to issue process of execution pending an appeal. It may be urged, however, suppose the appellant remains in custody he may have undergone his term of imprisonment before judgment is given in appeal, and how in that case can the court of appeal order him to be punished according to the conviction? But if he remains in custody after he gives notice of appeal is he undergoing sentence? Suppose that the sentence is for one month, and the court to which the appeal is taken does not sit for two months. The provision of paragraph (c) of sec. 880

is, if he remains in custody that he "shall . . . remain in custody until the holding of the court." There is no alternative provision whereby the imprisonment is determined at the expiration of the sentence, and the provision I have quoted is imperative. And then paragraph (e) provides that if the conviction is confirmed the court shall order the party "to be punished according to the conviction." It seems to me that imprisonment after notice of appeal is by way of securing the presence of the appellant at the court of appeal in case he does not enter into a recognizance so that he may be dealt with in case the conviction is affirmed or an order made against him. It is somewhat akin to the case where a party being convicted of an offence in the higher courts a case is stated under sec. 743 of the Code, and the party convicted is committed to prison pending the decision on the stated case. I do not wish to be understood as holding that if a person imprisoned by virtue of the conviction has served out a portion of his term of imprisonment before the notice of the appeal and the recognizance are given, the time so served shall not count if the conviction is affirmed and the appellant ordered to be punished according to the conviction. Having reached the conclusion that the appeal suspends execution on the conviction, does it also suspend the operation of the conviction respecting the forfeiture of the license? I am of opinion that it does. As before pointed out when the conviction is affirmed on appeal, the appellate court must order the party to be punished according to the conviction. Now in making this order the court does not point out the particular nature of the punishment; it does not recite the punishment and order it to be inflicted. The court would simply make an order somewhat in the following form: "That the appeal be dismissed, the conviction appealed against affirmed, and that the said A. B. be punished according to such conviction."

Now in the present instance how and in what manner was the party to be punished according to the conviction? In the first place and upon the face of the conviction, he was to pay a penalty, and in default to be imprisoned, and in the next place, and not upon the face of the conviction, but by operation of law by reason of such conviction, his license was to be forfeited. It seems to me that the one is just as much punishment "according to" (that is "by virtue of") the conviction as the other, and that if such punishment is suspended in the one case, it is suspended in the other. It may be that if the licensee sells liquor in the meanwhile he does so at his own peril, and that when the conviction is affirmed it might relate back to its date and the party selling be liable to conviction for doing so. I express no opinion on that point. I am of the opinion that under the facts stated in this case Colbourne was not liable to conviction, and that the conviction of 2nd May, 1900, should be quashed.

MCGUIRE, J.—

Case stated by a Justice of the Peace. The question is whether the fact of a licensee being convicted under sec. 122 of The License Act is a forfeiture of his license notwithstanding an appeal duly entered against such conviction and before the hearing and disposal of such appeal so that for thereafter selling liquor he can be convicted of so selling without a license.

The accused contends that the appeal and his entering into recognizance pursuant to sec. 880 operates as a stay of proceedings—as a supersedeas—as to the conviction under s. 122.

In practice it has always been considered that an appeal duly entered operates as a stay pending the appeal. The Criminal Code does not in terms say it shall or shall

not be a stay. Lord Campbell, C.J., in *Kendall v. Wilkinson*, 4 El. & Bl. 680 said that "in the vast majority of cases it would be exceedingly improper in the justice to grant a warrant after the notice and recognizance and before the hearing of the appeal, or before the time for hearing it has expired ; and acting from a corrupt motive he might be liable to an action on the case for maliciously granting it."

In the same judgment Lord Campbell observes "There is no universal judicial maxim or rule that an appeal or writ of error is a stay of execution pending the appeal or writ of error." It is true that in Courts of Equity an appeal was in England no stay of execution without a special order for that purpose. And a writ of error is not a supersedeas of execution in criminal cases. But in all these cases there is an opportunity to apply for an order staying execution to a court or judge, and there is an obvious convenience in the rule and in the various statutory provisions on the subject, that unless there is an order to that effect, an appeal shall not operate to suspend execution, as otherwise frivolous and dilatory appeals would thereby be invited and in any case where the justice of the case seems to justify a stay, a judge can be applied to and will grant the order. But in the case of appeals from summary convictions there is no mode that I am aware of by which such an order can be got, and unless there can be implied from the language of the Code that an appeal was intended to suspend execution, the right of appeal would be in many cases a barren right, for his goods might in the meantime be distrained to satisfy a conviction which it might turn out ought never to have been made. We have been referred to *Ex parte Wilmott*, but the judgment there avoided deciding on the effect of s. 27 of 11 & 12 Vict. c. 43, as to suspending execution



because in that case the warrant had issued prior to the appeal proceedings. *Kendall v. Wilkinson*, 4 El. & Bl. 680 was a matter of bastardy, and s. 35 of 11 & 12 Vict. c. 43, exempts such matters from the operation of the Act. But for s. 35 there must have been a decision on sec. 27, and Lord Campbell remarks: "From the 27th section . . . it might be argued that pending an appeal justices are not at liberty to grant a warrant or execution as they are expressly authorized to grant the warrant after the appeal is determined." Our sec. 885 corresponds with the English section 27.

In *Rex v. Brooke*, 2 Term Rep. 190, the reason given by Butler, J., against treating an appeal as a stay of execution was that as a sentence of imprisonment would run from the date of the conviction the term imposed might expire before the hearing of the appeal, and even if the conviction was confirmed the appellant would escape punishment. This reason does not apply to appeals under s. 880 when an appeal has been begun and recognizance duly entered into.

Let us see if we can gather from the language of the Code as to such appeals what was the intention of Parliament. First, as to the imprisonment; it is expressly provided that an appeal accompanied by the recognizance or deposit shall suspend execution so far as any imprisonment is concerned. Unfortunately the section is silent as to the enforcing of the pecuniary penalty. We are not lightly to suppose that Parliament intended an appeal to be a stay of one part, the more serious part of a conviction, and yet not a stay as to the fine. That such was not its intention may be inferred from the fact that the recognizance or deposit (as the case may be) must cover not only the costs of the appeal, but also the pecuniary penalty, if any, and the recognizance also provides for the

personal appearance of the appellant to abide the judgment of the court on the appeal. If the appeal did not stay execution as to the fines it would not have been necessary to require that the deposit should be "sufficient to cover the sum so adjudged to be paid" as well as "the costs of the appeal." The recognizance in *Kendall v. Wilkinson* was only for payment of costs, a circumstance which Lord Campbell considered entitled to "some regard." Then we find in s. 880 (e) it is provided that "in case of dismissal of an appeal by the defendant and the affirmance of the conviction or order" the court "shall order and adjudge the appellant to be punished according to the conviction, or to pay the amount adjudged by the said order." There is no proviso contemplating the possibility of the fine having been levied pending the appeal; the language used seems to assume that the conviction or order has not been enforced pending the appeal. Sec. 885 provides that "if an appeal . . . is decided in favor of the respondent the justice . . . may issue the warrant of distress or commitment for execution of the same as if no appeal had been brought." This is not language in harmony with the view that the justice could issue his warrant without waiting to see how the appeal would be decided. It is only "if the appeal is decided, etc.," that is, after the appeal is determined, that this section authorizes issue of warrant. Sec. 899 provides that an appeal may be abandoned, and in such case that "the costs of the appeal shall be added to the sum, if any, adjudged against the appellant . . . and the justice shall proceed on the conviction, etc. as if there had been no appeal." Why is this provided if, without this section, he was always at liberty to proceed as if there had been no appeal? Does this section not contemplate that enforcement of the conviction or order had been suspended? One's sense of

justice speaks strongly in favour of the view that the appeal was intended to operate as a stay; then we have the weighty utterance of Lord Campbell as to its being "exceedingly improper" in the vast majority of cases for the justice to proceed pending the appeal. If it was not intended that he should stay his hand why would it be "improper" for him to proceed?

I have come to the conclusion that Parliament intended that an appeal and recognizance suspended the conviction or order not only as to any imprisonment but also as to the pecuniary penalty or sum adjudged to be paid, that, in short, it intended the appeal should suspend and stay all the consequences of the conviction or order, and has by its language evidenced such intention.

Now one of the consequences of the conviction in the present case, it is said, is that the appellant's license is forfeited. Assuming for the present that such is the effect of sec. 122, the forfeiture of license is added by the ordinance to the penalty imposed by the conviction though not set forth in the conviction. It is urged that as the forfeiture is no part of the conviction, the appeal if even it be admitted to operate to suspend the enforcement of the imprisonment or penalty which the justice can direct by his conviction could not have been intended to suspend the forfeiture which is something added by the ordinance. If, however, my first conclusion be right the conviction was intended to be suspended entirely, and so would, while so suspended, be ineffectual to forfeit the license. In one case at least the ordinance seems to have expressed that its meaning does not include the decision of the tribunal of first instance unless and until it has become "final." Section 79 provides that "in the event of final judgment being recovered in an action" the license "shall thereupon be forfeited," which probably means that it is only when

the judgment has become "final" either by not being appealed from, or, if appealed, has been confirmed. It is reasonable to infer that what it meant in sec. 122 is a conviction which has become "final." Without, however, expressing any opinion on this, I am of opinion that the suspension created by the appeal is as to all the consequences, and, if forfeiture of license be one of the consequences of the conviction, it also is suspended pending the appeal, and that the forfeiture had not taken effect the appeal being still undisposed of.

I have questioned whether forfeiture is a consequence of the conviction at all, and I wish to avoid appearing to acquiesce in that proposition. It is open to question whether s. 122 expressly makes forfeiture to follow upon conviction. In all other sections as *e. g.* ss. 111, 12 (3), 77, 79, 92, 93, the ordinance makes clear by express language that the forfeiture follows as a consequence of the conviction or judgment. It is not necessary in the view already expressed to decide this latter question, and I therefore give no judgment thereon. I think the conviction should be quashed.

ROULEAU AND SCOTT, JJ., concurred.

RICHARDSON, J. (dissenting).—

The facts leading up to the submission of the stated case are briefly :—

That on the 28th November, 1899, Francis Colbourne, a hotelkeeper of Moose Jaw, and holding a license to sell spirituous liquors between 1st July, 1899, and 30th June, 1900, was convicted before Mr. Sanders, J.P., at Moose Jaw, with having sold liquor to one John Hawkins, an interdicted person, in violation of s. s. 3 of sec. 122 of the Liquor License Ordinance.

That within the time allowed therefor Colbourne gave notice of appeal from such conviction to the then next sitting of the court at which the appeal could be heard, to be held at Moose Jaw on the 10th of April, 1900, and perfected the security required for his appeal.

That in the interval between the conviction and the time for hearing the appeal, Colbourne continued selling liquor, and for one of such acts he was convicted, the charge being selling liquor without a license, the prosecution alleging and the J.P. holding that as by sub-section 3 of sec. 122 on conviction of a licensee for such an offence as Colbourne had been convicted of, his license should be forfeited, he was not thereafter a licensee or entitled to sell liquor.

The question this court has to determine is whether or not, pending an appeal from such a conviction as above stated, the license held by the person convicted continues in force.

In support of his contention that pending the appeal there is no forfeiture of license, Colbourne's counsel referred to sec. 885 of the Criminal Code. This provides that if, as a result of an appeal, the conviction is sustained, either the justice who made it or any other justice having territorial jurisdiction may issue the warrant of distress or commitment, for execution of the conviction as if no appeal had been brought. This only regulates proceedings after on appeal a conviction is sustained, and does not, so far as I conceive, support counsel's contention, nor does either of the cases *Re Wilmott* or *Kendall v. Wilkinson* assist.

Counsel on both sides in the argument referred the court to various paragraphs in Mr. Endlich's work on the construction of statutes as to how penal laws should be construed.

These summarized in my view, establish as a maxium or rule that penal laws are to be interpreted according to the language used in them, and in construing, the question is always "does the case fall within the scope and fair meaning of the language used in the Act." Now under sec. 880 of the Criminal Code, s. s. (c) if the conviction adjudges imprisonment the appellant may on complying with defined conditions obtain his liberty pending adjudication of his appeal, or if only a penalty or sum of money is adjudged to be paid may either deposit with the convicting justice money sufficient to cover the penalty and costs of the proceeding, including those on appeal, or give security Form 000 by recognizance for their ultimate payment and obedience to the judgment in appeal; then if the conviction be quashed s. s. (e) the deposit is to be paid the appellant. This does not assist the view of Colbourne's counsel. It only imposes conditions upon which execution of the adjudication made by the justice may be stayed.

With the contention of Colbourne's counsel that his appeal from conviction for selling to an interdict until the appeal is disposed of, suspends the operation of the enacting words in s. s. 3 of sec. 122 (which, following the conviction of a licensee for selling liquor to an interdicted person, are "his license shall be forfeited") because the law never could have contemplated at the stage of a J.P.'s conviction an absolute forfeiture of license inasmuch as by the appellate tribunal the J.P.'s adjudication might be reversed, I do not acquiesce, for the reason that Colbourne when accepting his license must be taken to have known the law to be that should a J.P. during its currency adjudicate him guilty of selling intoxicating liquor to an interdicted person, by such adjudication his license would become forfeited. The language used in the section I con-

ceive admits of no other fair sense or construction than that Colbourne after the conviction referred to ceased to be a licensee; that his license was forfeited. I interpret the law as laid down by Sir Robert Phillimore in *The Annandale* 2 P.D. 179, 218; 47 L.J., Adm. 3; 37 L.T. 139, 364; 26 W.R. 38; 3 Asp. M.C. 504. (followed on appeal) to be that the forfeiture accrued "at the time when the illegal act" (*i.e.* that for which Colbourne was convicted by the J.P. 28th Nov., 1889) "was done" and that it (the conviction) diverted out of Colbourne whatever property and rights he up to that time held under the license in question, and that as a result he, by his admittedly selling thereafter, violated the law.

Consequently in my opinion the conviction in respect of which the case has been stated should be affirmed. As, however, the other judges of this court are unanimously of a contrary opinion I yield to them.

*Conviction quashed.*

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## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MACMAHON, J.

## THE KING v. CAMERON.

*Carnally knowing girl under fourteen — Offence of indecent assault included—Summary trial by police magistrate with consent—Power to convict for lesser offence—Further proceedings “for the same cause”—Acquittal a bar to subsequent charge for lesser offence—Crim. Code secs. 259, 261, 269, 713, 785, 799.*

1. The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment.
2. A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment.
3. An acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence.

ARGUED: February 11, 1901.

DECIDED: February 13, 1901.

THIS was a case submitted by consent of the police magistrate, and of counsel for the Crown and for the accused, for the opinion of Mr. Justice MACMAHON.

*J. W. Curry, K.C., for the Crown.*

*E. F. B. Johnston, K.C., for the accused.*

TORONTO, February 13, 1801.

MACMAHON, J.—

The accused was charged before the police magistrate of Toronto, under sec. 269 of the Code with having carnal knowledge of a girl under the age of fourteen years. He



consented to be tried summarily under sec. 785, and was so tried and acquitted of the charge. After his acquittal an information was laid against him under sec. 269 of the Code, with having on the same occasion indecently assaulted the same female who was the prosecutrix on the charge of having carnal knowledge of her.

Under sec. 713, "Every count shall be deemed divisible, and if the commission of the offence charged as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit an offence so included." So that upon the trial of an indictment under sec. 269, the accused might have been found guilty of an indecent assault or a common assault, because the greater offence includes the lesser of a kindred character: *Reg. v. Read*, 1 Den. 377; *Reg. v. Connolly*, 26 U.C.R. 317; *Reg. v. Bradley*, 17 Cox, 463; even if the girl assented: *Taschereau*, p. 275.

My opinion is asked as to whether the police magistrate has authority to try the accused on the charge of having committed an indecent assault upon the same female on the same occasion as he was alleged to have carnal knowledge of her.

The police magistrate, I think, has no such power. Under sec. 785, where a person is charged before a magistrate with having committed an offence for which he may be tried at a Court of General Sessions of the Peace, such person may with his own consent be tried before such magistrate and may, if found guilty of any such offence, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. And, where

the accused consents to be tried by the magistrate, the magistrate is (sec. 786) to reduce the charge to writing and read the same to the accused, and if he pleads not guilty the magistrate is to examine the witnesses for the prosecution and also to hear the witnesses for the defence, if the accused desires to call any.

When the accused consented to be tried by the police magistrate, he was put upon his trial charged with an offence the commission of which included the commission of another offence, *i.e.*, an indecent assault or a common assault, and the accused might have been convicted of any offence so included which was proved, although the whole offence had not been proved.

There being no sufficient evidence to convict on the charge of having carnal knowledge of the prosecutrix, if there was evidence upon which the accused would have been found guilty of an indecent assault or of a common assault, the police magistrate should have convicted him of which ever of these offences the evidence warranted, as they were included in the commission of the more serious offence with which he was charged.

The fact that under an Act respecting Speedy Trials of Indictable Offences (being Part LIV. of the Code, sec. 774) where "the judge in any case tried before him shall have the same power as to . . . convicting of any other offence than that charged as a jury would have in case the prisoner were tried at a sittings of any court mentioned in this part," etc., has not changed my mind as to the powers of a police magistrate trying an accused person under secs. 785 and 786.

The accused might have been tried for the offence charged at a Court of General Sessions of the Peace, but consented to be tried summarily on the charge by the police magistrate. And, although tried summarily, the

trial must be subject to the same rules of law as a trial at the General Sessions of the Peace. And the same results follow on the conviction of the accused, as he may "be sentenced by the magistrate to the same punishment as he would be liable to if he had been tried before the Court of General Sessions of the Peace." So that when tried by a magistrate "on a charge of being guilty of any such offence," it must mean that the magistrate may find the accused guilty of "any such offence" as is included in the charge.

Were it not so, this anomalous result would follow: By sec. 797: "Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal." And sec. 798 provides that: "Every conviction under this part" (that is Part 55, The Summary Trial of Indictable Offences) "shall have the same effect as a conviction upon an indictment for the same offence." By sec. 799 it is provided that: "Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings *for the same cause*."

Upon the acquittal of the accused upon the charge preferred against him under sec. 269, of having carnal knowledge of the prosecutrix, it was the duty of the police magistrate to deliver to the accused a certificate of dismissal. And if, after the delivery of such certificate of dismissal to the accused, he was charged with having committed an indecent assault upon the prosecutrix at the time he was accused of having carnal knowledge of her (and therefore necessarily included in that charge), and he elected to be tried by a jury, and an indictment was found against him for such indecent assault, say, at the Court of General Sessions of the Peace, the certificate of dismissal

by the police magistrate on the first charge would be a complete bar under a plea of *autrefois acquit*.

It would be an anomalous and an unheard of thing that such a certificate of dismissal should form a bar to such further criminal proceedings in another Court, and be of no avail whatever in the Court from which the certificate issued.

Or suppose a person is charged with the commission of an offence and there is not sufficient evidence to convict him of the offence charged, but there is evidence of an attempt to commit the offence. If the magistrate acquitted the accused he could not again be put on trial for an attempt to commit the offence, for that was included in the charge on which he was tried, and he should have been convicted of the attempt. (See sec. 711 of the Code.) "An acquittal upon an indictment for murder may be pleaded in bar to another indictment for manslaughter: Fost, 392; 2 Hale 246; because he might have been convicted of the manslaughter on the first indictment. A person cannot, after being acquitted on an indictment for felony, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony. So, also, a person indicted and acquitted on an indictment for robbery cannot afterwards be indicted for an assault with intent to commit it." Archbold's Criminal Pleading (20th ed.) 148.

*Judgment for accused.*

**Note:** *Rules of evidence in indecent assault cases.*

If on an indictment of rape the jury acquit the accused of that offence, but find him guilty of indecent assault, and the other evidence in the case is ample to warrant the verdict, it should stand notwithstanding the improper admission in evidence of statements made by the prosecutrix by way of complaint following the offence, she having then complained of an assault but not of rape. *R. v. Graham* (1899), 3 Can.

*Note—Continued.*

Cr. Cas. 22 (Ont.). The accused may, on an indictment for rape, be convicted of assault with intent to commit rape. *John v. The Queen*, 15 Can. S.C.R. 384.

It was formerly the law that if the girl consented to the indecent assault, the prisoner could not be convicted of that offence, although the girl was under the age up to which consent is immaterial on a charge of carnally knowing, it being held that there could be no assault on a person consenting. *R. v. Connolly*, 26 U.C.Q.B. 317; *R. v. Paquet*, 9 Quebec L.R. 361; *R. v. Holmes*, 12 Cox C.C. 137. Now, by sec. 261 of the Criminal Code, 1892, it is provided that "It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency." But there can be still no conviction for *common* assault where there is consent.

If a medical practitioner unnecessarily strip a female patient naked under the pretence that he cannot otherwise judge of her illness, notwithstanding her continued protests and objections, it is an assault if he assisted to take off her clothes. *Rex v. Rosinski* (1824), 1 Moody C.C. 19, 1 Lewin C.C. 11. It is to be left to the jury to say whether the prisoner really believed that the stripping could assist him in enabling him to cure her. *Ibid.*

Apart from statutory provision, there can be in law no assault unless it be against consent. *R. v. Martin*, 9 C. & P. 215; *R. v. Guthrie*, L.R. 1 C.C.R. 241; 39 L.J.M.C. 95. Mere submission is not always equivalent to consent. A person may submit to an act done from ignorance, or the consent may be obtained by fraud; and in neither case would it be such consent as the law contemplates. *R. v. Lock*, L.R. 2 C.C.R. 10. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done is essential to a consent. *Ibid.*

Where a school teacher was charged with indecent assault upon one of his scholars, and it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months, it was held that evidence of the conduct of the prisoner towards her subsequent to the assault was properly admissible as tending to shew the indecent quality of the assault, and as being, in effect, a part or continuation of the same. *R. v. Chute*, 46 U.C.Q.B. 155.

If a schoolmaster takes indecent liberties with a female scholar without her consent, though she does not resist, he is liable to be punished as for an assault. *Rex v. Nichol* (1807), Russell & Ryan C.C. 130. In that case the girl's age was thirteen, and she testified that she knew it was wrong in him to act as he did, and for her to permit him,

**Notes—Continued.**

and that on all the occasions when the indecent liberties had been taken it was against her will. The acts complained of did not amount to carnal knowledge, and were not done with violence. The trial judge, Graham, B., said that the prisoner's authority and influence were likely to have put her still more off her guard than she would naturally have been from her age and inexperience; that a fear and awe of the prisoner might check her resistance and lessen her natural sense of modesty and decency; and that under such circumstances, less resistance was to be expected than in ordinary cases. The prisoner's intention was to be presumed from the indecencies and acts of lewdness. The jury were directed that "if they believed the girl, and thought that the acts of the prisoner were against her will, though she had not resisted to the utmost, they might find the prisoner guilty; but if they thought those acts were not against her will, they might acquit him." *Rex v. Nichol* (1807), Russell & Ry. C.C. 130.

In a prosecution on separate counts for common and indecent assault for a similar offence in respect of a girl of thirteen, Williams, J., in summing up, said to the jury: "No one can doubt that the offence, if done at all, was against the will of the prosecutrix, considering her tender age, and therefore, if you believe the evidence, the case is made out in law." *R. v. McGavaran* (1852), 6 Cox C.C. 64.

The best evidence possible should be given to prove the age of the girl where the age is material. 3 Russell on Crimes, 6th ed., 240. And where the only evidence of age was simply hearsay, it was held insufficient. *R. v. Wedge*, 5 C. & P. 298; *R. v. Hayes*, 2 Cox C.C. 226; *R. v. Nicholls*, 10 Cox C.C. 476.

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## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE, AND  
MEAGHER, JJ.

## THE QUEEN v. McNUTT.

*Illegal sale of liquor—Lease of premises for illegal purpose—Conviction—  
Appeal—Trial de novo on the appeal—Liquor License Act (N.S.)  
1895, sec. 128.*

1. Where unlicensed hotel premises are leased by the occupant to another as a mere cover to enable the lessor to continue the business, including the sale of liquors, and the agreement is illegal in purpose and design to the knowledge of both parties, it passes no title, and the lessor who remained in possession of the premises is liable to conviction as an "occupant" thereof within the meaning of the Nova Scotia Liquor License Act, 1895, in respect of an illegal sale of liquor made therein.
2. On an appeal from a conviction under said Act, the case is to be tried de novo, and the judge is at liberty to pronounce a new finding upon the facts, whether or not new evidence has been taken before him.

ARGUED: November 15, 1899.

DECIDED: February 7, 1900.

APPEAL from the judgment of John P. Chipman, Esq., Judge of the County Court for District No. 4, confirming the conviction made by L. G. Crowe, Esq., Stipendiary Magistrate for the town of Truro, whereby defendant was convicted for unlawfully selling liquor at retail without the license therefor by law required, and was convicted of a third offence against the Liquor License Act, 1895.

HALIFAX, November 15, 1899.

*F. A. Laurence, Q.C.*, in support of appeal: There is no evidence that the defendant was an "occupant" within the meaning of the Act.

*S. D. McLellan*, contra : The burden is on the defendant to prove that he is not the occupant : N.S. Liquor License Act, 1895, sec. 123. There is ample evidence to support the judgment. As to the effect of the findings of the trial judge : *Knock v. Knock*, 29 N.S.R. 269. The lease is void because it is entered into for an illegal purpose.

*F. A. Laurence*, Q.C., in reply.

HALIFAX, February 7, 1900.

The judgment of the Court was delivered by

MEAGHER, J.—

The defendant was convicted of the offence of selling liquors contrary to law in Truro by the Stipendiary Magistrate of that town, and upon appeal to the County Court Judge the conviction was affirmed.

The present appeal is from the latter decision. There is no dispute as to the fact of the sale nor its illegality. It was made in the bar, situate in one of the rooms of the Oxford Hotel, of which the defendant was the owner, and in which he and his family were then living. But it is claimed that they were in the hotel merely as the servants or agents of one McCallum, the alleged lessee thereof, and that, in point of fact, none of them had anything to do with running the bar in which the sale was made. The hotel and bar and the stable were operated and managed by the defendant and his family on his own account up at least to the 20th or 25th of December, 1898.

About or at the earlier of these dates the defendant is said to have made an agreement with McCallum, who is his wife's brother, to lease him the entire premises for one



year. The lease is before us. It bears date January 5, 1899, and purports to convey the premises for one year from that date.

Under an arrangement said to have been made, the defendant was to manage the stable and do odd chores about the house, but was to have nothing to do with the bar. For such services he says he was to be boarded and to receive 50 cents a week, or more. But McCallum says he was only to receive his board and anything further he might think proper to allow him.

The lease is silent as to payment of taxes, but the defendant was shewn to have paid them, and in order to rebut the inference deducible from that fact, defendant testifies that he was to pay the taxes, thus adding a new term to the lease. No books or accounts of income or expenditure of any part of the premises were kept. This would not be material if McNutt was running the premises on his own account, but if, as alleged, he and his family were managing it as the agent of McCallum, who was absent part of the time, it is strange indeed that no account of any kind was kept. The indifference shewn by the lessee to the results produced from the business, including the bar, is consistent only with the belief that he was not personally interested in them.

There appears, practically, to have been an entire absence of detail with respect to the wages, the keeping of accounts, and other matters of that kind, wholly out of line with what one would expect if the lease was a bona fide one and not a mere cover for the defendant. No inventory appears to have been made of the contents of the hotel, barn or bar; and no method of fixing or accounting for the value of any of the leased articles, which might be lost, injured, or destroyed during the term, was provided by the lease or otherwise.

No actual change was made in the occupation or management of the hotel, and defendant's name was permitted to remain on the door of the hotel as its proprietor, as before. McCallum was unable to tell how much of the rent had been paid or how much he had paid. In one place he said he gave defendant's wife charge of the hotel, and in another part he said he gave Elliott, who sold in the bar, charge of it. He received and was satisfied with whatever money Elliott or Mrs. McNutt gave him, without enquiry and without counting it. He also said that he had not been very particular with the defendant; that defendant had always treated him well; and so long as McNutt was satisfied he, McCallum, was suited. That is just what one would expect if the defendant, and not McCallum, was the party beneficially interested in the hotel and bar business during that period.

I have no doubt at all that the lease was a mere cover to enable the defendant to continue the business in the hotel and bar, and to derive the benefit from it under the protection the lessee's name, it was hoped, would give him. If McCallum had a personal interest in it, it is very probable he would have remained in the hotel and looked after it instead of following a business much more laborious and less profitable.

Holding these views, it follows that the appeal must fail.

There is still another view, namely, that the lease, apart from being a mere cover, was illegal in purpose and design to the knowledge of both parties; that it passed no title, and therefore the defendant, who remained in possession of the premises, was liable to be regarded as "the occupant" thereof within the meaning of sec. 128 of ch. 2 of the Acts of 1895. One of the findings below is to that effect.

All the witnesses speak of the place where liquors were sold in the hotel as "a bar." They meant, I have no doubt, a place equipped, as bars usually are, with all the furniture and appliances necessary for the sale and consumption of liquors therein.

All these went into the possession of McCallum under the lease, with the intention on the part of the lessor and lessee that the latter should use them in the sale of liquors.

He took possession of the bar as soon as the agreement for the lease was made, and began to sell liquors therein, and replenished the stock. In the interval between his so taking possession and the execution of the lease, and the commencement of the term thereunder, a period of at least two weeks, both lessor and lessee appear to have been about the hotel.

The lessee says that the defendant likely knew what he was doing, and that he had replenished the bar with liquors.

The lessee could not have taken possession, nor put in a stock, nor carried on sales in the bar, without the defendant's knowledge. It is impossible, therefore, it seems to me, to doubt that when defendant, on the 5th of January, executed the lease he knew the purpose to which the lessee had already devoted the bar, and that fact in itself afforded strong ground for an inference on defendant's part that it was his intention to continue the business he had begun, and therefore, by executing the lease at the time he did, and with the knowledge he possessed, the defendant became a party to such illegal purpose.

The fact, too, that in the alleged arrangement for carrying on the hotel, the bar was excepted from the management of the defendant and his wife, and that defendant was then in control and operating it, tends to

shew that the common understanding was that it should be kept and devoted to the purposes for which it was suitably equipped.

Lord Abinger, C.B., in *The Gas, Light and Coke Co. v. Turner* (1840), 6 Bing. N.C. 327, said :—

“All the decisions shew that, at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced. . . . It seems to me to be a void lease, having been granted expressly for an illegal object.”

The argument was urged there that the lease operated as a conveyance of the plaintiff's estate, and therefore a recovery of the rent could be had under the covenant annexed to it, but it did not prevail.

In *Ritchie v. Smith* (1848), 6 C.B. 462, an agreement entered into for the contravention of a statute passed for the protection of public morals, was regarded as altogether void.

In *Waugh v. Morris* (1873), L.R. 8 Q.B. 207, Blackburn, J., speaking for Cockburn, C.J., Mellor, J., and himself, said :—

“We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not.”

In this connection the observation of Wilde, C.J., in *Ritchie v. Smith*, cited above, is in point. He said :—

“I cannot conceive a party to be more conducive to the commission of an offence than by furnishing the place in which it is to be committed.”

Both Leake and Pollock, in their treatises on contracts, regard a contract such as this as a void contract. If, therefore, this lease was void—and I am persuaded that it was—at all events in the sense and to the extent at least that the defendant, who remained and was in possession

of the premises at the time this offence was committed, cannot avail himself of its provisions to shew that he was not the occupant, but was merely the agent or servant of McCallum, the alleged lessee,—he cannot be permitted to call the provisions of that lease to his aid. He must be regarded under the circumstances, in view of his continuous possession, as if that lease had never been made. In this view he was the occupant, and was therefore liable. Viewed as a whole, I am of the opinion that the defendant was rightly convicted, and that the appeal must be dismissed with costs.

The learned County Court Judge appears to have been of the opinion that he could not disturb the conviction unless he was convinced that the finding below was clearly wrong, and further, that there were some principles decided in *The Queen v. Learment* (1898), 31 N.S.R. 387, which governed the present case.

It is proper to observe in this connection that the County Court Judge is, under the provisions of the statute referred to, enabled to take further testimony upon the appeal, and is required to make such order "as he may think just." The effect of the statute, therefore, is, it appears to us, to require him to try the case *de novo*, and to make such conclusion upon the evidence as he thinks just, whether new evidence has been taken before him or not. This means, I take it, that he is to exercise an independent judgment of his own, unfettered by the findings; in other words, a decision which commends itself to his judgment as a just one, without regard to the findings below. The effect of the appeal under this statute appears to be to vacate the judgment below. *Rand v. Rockwell*, 2 N.S. Dec. 199. But it is not necessary to go that far.

The question determined in *The Queen v. Learment*, 31 N.S.R. 387, was, as in the present case, purely one of fact, namely, that the arrangement was a mere cover for the defendant, a collusive bargain for the defendant's benefit and protection.

For these reasons I am unable—and I say it with becoming deference—to conclude that there was any principle of law or procedure settled in that case which could properly be regarded as, in any sense, controlling the decision in the present case.

The foregoing observations are not in any view necessary to the present decision, and have been made to avoid the conclusion which might otherwise be drawn, that we assented to the views expressed in the judgment before us upon these points.

*Appeal dismissed without costs.*

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## [SUPREME COURT OF CANADA.]

BEFORE TASCHEREAU, GWYNNE, SEDGEWICK, KING,  
AND GIROUARD, JJ.

## UNION COLLIERY CO. v. THE QUEEN.

*Corporation—Neglect of duty causing death—Maintaining unsafe railway bridge—Criminal proceedings—Manslaughter—“Grievous bodily injury”—Punishment of corporation by fine—Crim. Code secs. 192, 213, 252, 639, 934.*

1. Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control.
2. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.
3. As the Criminal Code provides no punishment for the offence, the common law punishment of a fine may be imposed on a corporation indicted under it.

*The Queen v. Union Colliery Co.*, 3 Can. Cr. Cas. 523, affirmed.

ARGUED : October 22, 1900.

DECIDED : December 7, 1900.

APPEAL from a decision of the Supreme Court of British Columbia, 3 Can. Cr. Cas. 523, 7 B.C. Rep. 247, affirming the conviction of the appellant company on a case reserved.

The company was indicted for unlawfully causing the death of certain persons by neglecting to properly maintain a bridge over which certain trains were run when a train broke through. At the trial a verdict of guilty was entered and a case was reserved for the opinion of the Court of Appeal on the question whether or not the indictment would lie against a corporation. The reserved case is set out in the judgment of Mr. Justice Sedgewick speaking for the majority of the court.

*Aylesworth*, Q.C., for the appellant.

*Christopher Robinson*, Q.C., for the respondent.

TASCHEREAU, J., took no part in the judgment.

The judgment of the majority of the court was delivered by

SEDGEWICK, J.—

This is an appeal from a judgment of the Supreme Court of British Columbia upon a reserved case stated by Mr. Justice Walkem for the consideration of the court, the defendants having been convicted and sentenced to pay a fine of \$5000. Upon the appeal the court was equally divided. [His Lordship here stated the reserved case and the indictment as set forth in the report of the case below, 3 Can. Cr. Cas. 523.]

A verdict of guilty having been found against the defendants upon the indictment above set out, we must assume that all the facts therein stated are correct. And they are substantially as follows:—

The company, in pursuance of its corporate powers, had for a long time past been operating a railway for the purpose of transporting coal from their mines to a place of shipment by means of locomotives, and whether in pursuance of their *corporate* powers or not, they, as a matter of fact, were engaged in the carrying of passengers, holding themselves out as common carriers by railway. The road crossed the Trent River by means of a bridge 130 feet in length and 90 feet above the river bed. The company, neglecting to use reasonable care in maintaining the bridge so that it became unsafe, ran a train carrying passengers across it, which train broke through owing to the rotten state of its timbers, causing the death of six persons then



being on the train. And the sole question for our consideration is whether these facts constitute a criminal offence whether by statute or at common law.

It was at one time thought that a private corporation could not commit torts or be held liable for the wrongful acts of its officers or agents, but this view has long since been exploded. A similar notion obtained in early times as to the criminal liability of a corporation, but it has long since been settled that they are liable to indictment for non-feasance or for negligence in the performance of a legal duty. It was not until 1846 that their liability for misfeasance or active negligence was determined to be subject to like proceeding. In the case of *The Queen v. The Great North of England Railway Co.*, 9 Q.B. 315, in 1846, Lord Denman, C.J., in delivering the judgment of the court, said, at p. 325 :

“The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with undisputed decisions, that an indictment may be maintained against a corporation for non-feasance. . . . But the argument is, that for the wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence.

“No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a

bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

"But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."

This case has been followed on many occasions, and cited with approval in the House of Lords.

In the case of *Whitfield v. South Eastern Railway Co.*, 1 E. B. & E. 115, Lord Campbell held that a railway company might be sued for a malicious libel, and in the course of his judgment says: "The ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But, considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation. The authorities are collected and commented upon in *Regina v. Great North of England Railway Company*, 9 Q.B. 315, in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a public highway."

And in the *Pharmaceutical Society v. London and*

*Provincial Supply Association*, 5 App. Cas. 857, Lord Blackburn says, at p. 869: "I quite agree that a corporation cannot in one sense commit a crime—a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, upon the supposition that a body corporate, or a corporation that incorporated itself for the purpose of publishing a newspaper, could not be tried and fined, or an action for damages be brought against it for libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case."

From these authorities it is manifest that a corporation can render itself amenable to the criminal law for acts resulting in damage to numbers of people, or which are invasions of the rights or privileges of the public at large, or detrimental to the general wellbeing or interests of the State. It appears to me perfectly clear that the offence set out in the declaration comes within this description.

A public franchise was granted to the defendants to maintain and operate a railway between two certain points. They were possibly under no obligation to accept the charter, but having once accepted and acted upon it, they were under an obligation to exercise proper care and diligence in the performance of their corporate powers. Holding themselves out, as we are bound to assume they did, as public carriers, they were bound to carry their passengers safely. Even as carriers not of passengers, but

of freight, carrying on their business by means of trains and locomotive engines, they were, in my view, equally bound to see to the safety and protection of their employees. Whether the persons alleged in the indictment to have been killed were employees or passengers does not appear, but whether passengers or employees, the company defendants were under an equal obligation to both, and the offence committed was an offence not so much against individual right or against people in their private capacities, but against the public at large, and therefore, in the public interest, indictable. The learned Chief Justice has stated that the question to be determined is whether or not the company is liable to punishment under any section of the Code: or (I add) at common law. It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. As stated by a text writer: "We can always separate the offence from the punishment. So that, for example, a statute which provides a new punishment for an old offence, repeals by implication only so much of the prior law as concerns the punishment, leaving it permissible to indict an offender either under the old law, whether statutory or common, and inflict upon him, upon conviction, the punishment ordained by the new, or under the new statute at the election of the prosecuting power. The offence and punishment, therefore, may be

defined by different laws; and so, as we have seen, if a statute simply creates an offence, the common law punishment may by implication be imposed." Bishop on Statutory Crimes, 2nd ed., p. 166.

But the ground of offence set out in the declaration has, it is clear, been dealt with by the Code, and the indictment is evidently framed, the prosecuting officer having them before him, under the provisions of sec. 213, which is as follows: "Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to avoid such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty." This article I take to be a mere statutory statement of the common law, neither abridging nor enlarging it in any respect. It is true this section has no penal provision attached to it; it does not state what the consequences shall be if the offence therein specified has been committed, but it clearly covers the offence specified here. The defendants have in their charge and under their control, and they maintain, a railway the running and operation of which without precaution or care must necessarily involve danger to human life. They were therefore under a legal duty to take precautions against such danger. They disregarded this duty. The anticipated event occurred, and they are criminally responsible for it. It is not, I think, necessary to search through other provisions of the Code to find a penalty. The common law, in the case of a corporation, prescribed it—a fine. And the indictment is properly framed and the verdict found, and the fine imposed, both under it and the common law together.

It was, however, contended that "every one" at the beginning of the section does not include a corporation. I think it does. Sec. 3 (t) states: "The expressions 'person,' 'owner,' and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively."

"Everyone" is an expression of the same kind as "person," and therefore includes bodies corporate unless the context requires otherwise. There is no doubt that the expression "every one" is, whether in a legal or popular sense, a wider term than the word "person," and in the case of *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857, already referred to, the Lord Chancellor (Lord Selborne), says: "There can be no question that the word 'person' may, and I should be disposed myself to say *primâ facie* does, in a public statute include a person in law; that is, a corporation as well as a natural person. . . ."

"That if a statute provides that no person shall do a particular act except on a particular condition, it is *primâ facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever."

Applying this rule to the present case, inasmuch as criminal offences committed by corporations are for the most part offences confined to the class in question in the

present case, namely, cases arising from dereliction in the performance of public duty, at all events, offences as possible and likely to be committed by artificial as by natural persons, there can be no reason, that I can see, why a corporation should not be included in the phrase "every one." The article is a statement of general principle of criminal law, applicable to the whole world, and binding as much upon corporations as upon individuals.

Several sections of the Code were cited to us at the argument, as including within their purview the offence described in the indictment. If I am correct in the view I have taken of sec. 213, above cited, the offence described in the indictment comes within arts. 191 and 192, where the offence of a common nuisance is described and its punishment provided for, the first section being a mere statement of the common law in regard to criminal nuisance. Whether it does not also come within secs. 251 and 252 may be open to argument, although I am strongly inclined to the view that where the Code specifies an offence and provides for the punishment by imprisonment only, it does not necessarily follow that a corporation may not be indicted and fined for the offence so described. It is not, however, necessary to determine that point here.

It is further argued that as the indictment disclosed a case of manslaughter, and as (as is stated) an indictment will not lie against a corporation for manslaughter, the conviction was not maintainable. It is possible that the facts alleged in the indictment would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged in the indictment here is not the manslaughter; it is criminal negligence in the discharge of duty. The killing is not alleged as the offence, but merely the consequence of the offence. In an

indictment for manslaughter it is at least necessary to charge manslaughter as the crime—to allege that the defendants “unlawfully did kill and slay, etc.,” or “did commit manslaughter,” allegations wholly absent in the present case. It is not, therefore, necessary here to express any opinion as to whether or not under the present state of the law and its constantly broadening and widening jurisprudence on the subject of the civil and criminal liability of bodies corporate, they are capable of committing the offence.

KING, J. (dissenting).—

I am of opinion that the question stated in the reserved case should be answered in the negative, with the result that the appeal should be allowed and the conviction quashed.

*Appeal dismissed.*

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## [COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

## THE KING v. TRAYNOR.

*Preliminary inquiry—Manner of taking depositions—Court stenographer recording depositions by magistrate's direction and in his absence—Objection—Waiver—Cross-examination—Invalid commitment—Indictment quashed for invalidity of depositions on which founded—Cr. Code secs. 590, 594, 596, 641.*

1. Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate.
2. The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine.
3. Both the commitment for trial and the indictment founded on such illegal depositions are invalid and should be set aside.

MONTREAL, March 12, 1901.

WÜRTELE, J.—

The prisoner, Frederick Traynor, was charged on the 24th January, 1899, before Mr. Ulric Lafontaine, a justice of the peace at Montreal, with having on the previous day in that city stolen from the person of Helen Hutchison a purse containing \$4.96, and on the 9th day of February following the justice of the peace committed him for trial. The information was laid by a constable of the city of Montreal, named Joseph Broomfield, but he was not

bound over to prosecute the accused. A bill of indictment was laid before the Grand Jury, and on the 1st March, 1899, a true bill was found against the prisoner and was returned into court. Before he could be arraigned, the prisoner fled from the city and was only found and arrested since the commencement of the present term. He was placed at the bar on the 5th day of this month, and, before pleading, his counsel moved that the indictment be quashed, among other reasons, because at the preliminary inquiry the evidence was not taken in the presence nor within the hearing of the justice of the peace who committed the prisoner for trial, and because he was therefore illegally committed.

The following facts appear from the record of the proceedings at the preliminary inquiry: The witnesses were sworn by the justice of the peace and were then taken into another room and their evidence in chief was taken down in shorthand by a stenographer in the absence of the justice of the peace. The witnesses were afterwards brought before the justice of the peace for cross-examination, but the prisoner's counsel objected to the evidence as illegal, and therefore inadmissible, inasmuch as it had not been taken in the presence or even within the hearing of the justice of the peace. The latter did not thereupon examine the witnesses afresh but reserved the objection, and the prisoner's counsel then cross-examined them under reservation, however, of his objection. There is no decision on the objection, but after the prisoner on the 9th February, 1899, had declared that he dispensed with the reading of the depositions, and that he had no witnesses, and had stated that he was not guilty, the justice of the peace committed him for trial, but did not bind over the informant or any other person to prosecute. The counsel acting on behalf of the Crown in the ensuing

term laid a bill of indictment before the Grand Jury, and a true bill was returned. The prisoner's counsel now contends that the indictment obtained on the proceedings which I have mentioned is illegal, and that it should be declared null and void and quashed.

Three questions have to be considered to decide the point of law raised :—

(1) Were the depositions properly taken in the absence of the justice of the peace ?

(2) If they were improperly taken, what is their effect ?

(3) If they were illegal, how does their illegality affect the commitment for trial and the indictment ?

It is a general rule that depositions in a criminal prosecution must be taken in the presence of the magistrate before whom the case is proceeding, and Article 590 of the Criminal Code expressly provides in effect that when a magistrate is holding a preliminary inquiry the accused must be before him, and that he must take the evidence of the witnesses called for the prosecution. The magistrate is not required to take down the evidence himself, but the law requires in effect that the witnesses must be before him, and that he must see them and hear them when testifying, and then their testimony may be taken down either at length by a clerk or in shorthand by a stenographer. This did not take place in the present case; on the contrary, the witnesses gave their examination in chief in the absence and outside of the hearing of the magistrate. The depositions were therefore improperly and illegally taken.

It is also a general rule that to render depositions of any legal value they must be actually taken in the presence of the magistrate. In the case of *The Queen v. Watts*, 33 L.J.M.C., p. 63 (of which a summary is to be

found on p. 216 of the 5th edition of Saunders' Practice of Magistrates' Courts), in which the evidence in chief was taken like in the present case in the absence of the magistrate, and in which one of the depositions was tendered in evidence on the ground that the witness was unable to attend through illness, an objection was taken to its admissibility on the ground that it had not been taken in conformity with sec. 17 of 11 & 12 Vict. ch. 42, which contains provisions similar to sec. 590 of our Criminal Code, it was held by the Court for Crown Cases Reserved that the deposition had been improperly taken, and was therefore illegal and inadmissible in evidence. In this connection I may quote the words of Saunders at p. 216: "It must be borne in mind, too, that to render the depositions of any legal value they must be taken in the presence of the magistrate;" and also the following words from p. 211 of Gibson and Weldon's Criminal and Magisterial Law: "Further, the depositions must have been taken in the presence of the prisoner and in the presence of the justice." I will also refer to the dictum of Mr. Justice Wills in the case of *The Queen v. Guerin*, 16 Cox's Crim. Cases, in order to shew the reason for this rule: "It is contrary to all my ideas and experience of justice for depositions taken before one magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon, without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to judge for himself of the truth of their statements." A deposition taken at a preliminary inquiry in the absence of the magistrate has no legal value whatever; it is not admissible in evidence, and being illegal, it cannot be used as the foundation for any ulterior action.

Such being the case, the magistrate had not before him

any legal depositions on which he could decide that there was sufficient evidence to put the accused on his trial. Secs. 594 and 596 of the Criminal Code provide that when all the witnesses have been heard, the magistrate shall on the evidence decide either that no sufficient case has been made out to put the accused upon his trial, or that there is a sufficient case to put him on his trial; but for this purpose the evidence must be legal evidence, and to be such must have been taken in his presence.

An illegal document or proceeding can have no legal and valid effect, and consequently the commitment of the prisoner for trial, the bill of indictment founded on his illegal commitment or on the illegal depositions, and the true bill and indictment reported by the Grand Jury are therefore illegal, invalid, and ineffectual, and must be declared null and void.

It is a satisfaction to me to know that the view and decision I have expressed are in accord with those expressed by my colleague, Mr. Justice Hall, in a recent case of *The Queen v. Baynes*, although I have not yet had an opportunity of seeing the text of his judgment.

But in addition to the illegality which I have pointed out, there is yet another, although the prisoner has not complained of it.

Under sec. 641 of the Criminal Code, as it existed when the bill of indictment was preferred to the Grand Jury, only a person who was bound over to prosecute could prefer a bill of indictment, except however the Attorney-General himself or some one by his direction, or some one with the written order of the Attorney-General or of a judge or a court of criminal jurisdiction. In the present case no one was bound over to prosecute, and no one was authorized to prefer the bill of indictment. It was laid before the Grand Jury by the Crown prosecutors

without the direction of the Attorney-General and without any order or consent from the latter or from a judge or a court of criminal jurisdiction. As a matter of fact, the prosecutors in many cases have not been bound over to prosecute, and in such cases bills have been submitted by the Crown prosecutors without the irregularity having been noticed. But as sec. 641 of the Criminal Code enacted that bills of indictment could only be preferred in accordance with its provisions, it followed that the Crown prosecutors were not authorized to submit bills where the informant or prosecutor had not been bound over, and that the indictments found in such cases were illegal and invalid. I must, however, add that in these cases the Crown prosecutors acted only through inadvertence, as they must have presumed that all the formalities connected with the commitment for trial had been fulfilled.

This defect has, however, been remedied by one of the amendments to the Criminal Code adopted last year, and which has been in force since the first of January last. Now the counsel acting on behalf of the Crown can himself prefer a bill of indictment against any person who has been committed, either on the charge for which he has been committed or for any charge disclosed by the depositions taken before the magistrate. But, of course, even in such cases the depositions must have been legally taken, and the commitment must have been regular and legal.

For the reasons set up by the motion made on behalf of the prisoner, and which I have mentioned, I quash the indictment and order that the prisoner be discharged.

*Indictment quashed.*

*Edmund Guerin, K.C., for the prisoner.*

*J. P. Cooke, K.C., Crown prosecutor.*

[COURT OF GENERAL SESSIONS, COUNTY  
OF YORK, ONTARIO.]

BEFORE HIS HONOUR JOSEPH E. McDOUGALL, COUNTY JUDGE  
AND CHAIRMAN OF SESSIONS.

**THE KING v. LEE**  
(and three other cases).

*Sentence—Illegally practising medicine—Statutory limit of one month's imprisonment—When "thirty days" exceeds a calendar month—Variance of conviction from adjudication—Defect of form or substance—New adjudication—Crim. Code sec. 883 not applicable to convictions under provincial law—Ontario Medical Act, R.S.O. 1897, c. 176—Ontario Summary Convictions Act, R.S.O. 1897, c. 90.*

1. Where the limit of punishment fixed by statute in respect of an offence is "imprisonment not exceeding one month," a sentence for a term of thirty days commencing in the month of February, and therefore exceeding a calendar month, is invalid.
2. Where in summary conviction proceedings under the Ontario Medical Act the adjudication was that, in default of payment of the fine imposed, the defendant should be imprisoned for such excessive term, but in the formal conviction imprisonment was directed for one month, the conviction is invalid by reason of the variance from the adjudication.
3. A variance of the formal conviction from the minute of adjudication as regards the term of imprisonment is a new adjudication and is not a mere defect of form or of substance.
4. The powers of amending a defective summary conviction conferred by sec. 883 of the Criminal Code of Canada do not extend to or apply to convictions made under an Ontario statute.

DECIDED : April 2, 1901.

APPEALS against four several convictions made against the four defendants separately for offences alleged to have been committed by each of them against sec. 49 of the Ontario Medical Act, in practising and professing to practise medicine for hire, gain or hope of reward, contrary to the prohibition of the statute.

The objections taken to the convictions were identical, and are as follows :—

1. The conviction does not follow the adjudication in that the adjudication directs in default of payment of the fine imprisonment for thirty days. The conviction directs imprisonment for one month.

2. The conviction only disclosed one act which does not constitute practising.

3. The conviction discloses two offences: (1) Practising and (2) Professing to practise.

4. That no power of amendment of the conviction exists, because sec. 883 of the Code, which allows the Court hearing the appeal to make a new conviction, or to confirm, reverse or modify the conviction of the justice, etc., does not apply to a conviction for an offence against an Ontario statute.

*DuVernet*, for appellants.

*Curry*, K.C., for the prosecutor.

TORONTO, April 2, 1901.

McDOUGALL, Co. J.—

As to the first objection, the conviction was made on the 5th February. In the adjudication the defendant is fined \$25 and costs, or thirty days in jail, without hard labour. The limit of imprisonment fixed by the Medical Act, R.S.O. ch. 176, sec. 55, is "not exceeding one month." A month from the 5th February would expire on the 5th March; 30 days from the 5th February would not expire till the 7th March, or a term of two days longer than the calendar month of February. In *Reg. v. Hartley*, 20 Ont. R. 484, Rose, J., quotes approvingly *McLennan v. McKinnon*, 1 Ont. R. 219, the language of Armour, J.: "The record of conviction may be said generally to contain two adjudications; one the adjudication of the guilt, or conviction properly so called; and the other the adjudication



of punishment, or sentence so called," and then Rose, J., goes on to say, at page 485: "It may be, and I am of opinion that it is so, that when the magistrate has exercised his judgment or discretion, and has nominated the fine, and fixed the term of imprisonment, as in this case both being within his discretion, the formal conviction must follow the adjudication, because it must be in accordance with the fact, and the fact is shewn by the minute of conviction, and that in order to vary the fine or imprisonment it would be necessary to have a new adjudication. . . . I confess I entertain strong doubt as to the power of the Court to amend the adjudication."

In *Reg. v. Hartley*, however, it was held that although the minute contained a direction to levy a distress for the fine and costs (the statute not authorising distress), and then directed that in default of sufficient distress imprisonment should follow, and the formal conviction did not follow the minute in directing that the fine and costs should be levied by distress, yet the conviction was good notwithstanding the omission of the provision as to distress, because the magistrate had no power to award any distress under the statute giving him jurisdiction to deal with the offence, but had power to impose the fine and direct the imprisonment set out in the minute and conviction.

In *Reg. v. Walsh*, 2 Ont. R. 206, it was held, where in the minute of adjudication the costs were fixed at \$5.20, a conviction was bad which required the defendant to pay \$5.27 for costs.

In *Reg. v. Elliott*, 12 Ont. R. 524, where the magistrate had included in the costs ordered to be paid by the defendant one dollar "for the use of hall," Rose, J., following *Regina v. Walsh*, held that he had no power to amend the conviction by reducing the amount of costs by \$1.00, because that would be creating a variance between the

adjudication and the conviction, and said, "I have no power to interfere with the adjudication." The conviction was quashed.

In my opinion the variation of the conviction from the minute in the matter of the term of imprisonment is something more than a defect of form or substance—it is a new adjudication. (See remarks of Wilson, C.J., in *Reg. v. Brady*, 12 Ont. R. 363.) The defect in the minute is a defect which goes to the jurisdiction of the magistrate.

As to the second objection the conviction only sets out one act as occurring on a named day. I have already discussed very fully in *Reg. v. Whelan*, 4 Can. Cr. Cas. 277, what must be shewn to amount to a practising of medicine. The single act of prescribing medicine to one person on one day will not amount to a practising of medicine. The conviction charges that the defendant on the date named in the conviction prescribed for Minnie Warring and others contrary, etc. Upon looking at the testimony there is no evidence of the defendant on that day or at any prior date having prescribed for any one. Evidence of acts of practising antecedent to the date named in the conviction might no doubt be given to establish a practising, and possibly evidence of acts of practising subsequent to the date laid in the conviction, but before the date of the information, might be given as establishing, or tending to establish, a practising of medicine. These acts, however, must be sufficiently approximate in point of time to afford evidence of practising, rather than tending to establish the commission of a separate offence: *Apothecaries v. Jones*, 1 Q.B.D. 893. Under the case of *Reg. v. Spain*, 18 Ont. R. 315, and the cases therein cited, it has been held that it is necessary that the conviction should set out the particular act or acts by the defendant which constitute the practis-

ing. The present convictions do not do so, and in this particular they are therefore defective.

The fourth objection anticipates the contention that the present appeal is a new trial, and if the remedial clauses of the Code apply, especially sec. 883, then the Court can ignore the adjudication and the formal conviction, and upon the evidence make a new adjudication and frame a new conviction, which would be free from any of the defects complained of. It was strongly urged by counsel for the prosecutor that sec. 883 and the other clause of the Code applied to proceedings leading to a conviction, and to an appeal therefrom in regard to offences against an Ontario statute. It is no doubt true that for a time the superior Courts leaned to this view, but latterly the point has apparently received further consideration at the hands of the High Court Judges, and the case of *The Queen v. Roche*, 4 Can. Crim. Cas. 64, 32 Ont. R. 20, and *The Queen v. Murdock*, 4 Can. Cr. Cas. 82, 27 Ont. App. 443, shew the gradual trend of judicial opinion, and more recently the case of *The Queen v. McMillan*, not yet reported, expressly holds that the powers to amend mistakes or faults in a conviction where such conviction is made under the provision of a Dominion Act do not extend to or apply to the amendment of a similar mistake or fault where they occur in a conviction made under the provisions of an Ontario Act. I have already followed the decision in *The Queen v. McMillan* in two cases recently disposed of by me, namely, *The Queen v. Reddock* and *The Queen v. Henry*. I see no reason for reconsidering the opinion expressed in those cases.

I think each of the above four convictions now in review are bad upon the grounds taken in the first and second objections, and I do not find it necessary to consider the third objection as to there being two offences disclosed

in both the information and conviction, namely practising and professing to practice. I express no opinion as to the validity or invalidity of this objection. There will be an order in each case quashing each conviction with costs.

*Convictions quashed.*

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[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

BEFORE SIR ALEXANDER LACOSTE, C.J., AND BOSSE,  
BLANCHET, HALL AND OUMET, JJ.

**THE KING v. RIENDEAU (No. 2).**

*Rape—Evidence—Admissibility—Conduct inconsistent with resistance—  
Subsequent interview between complainant and accused—Collateral  
facts—Contradicting complainant's denial on cross-examination—  
Crim. Code, sec. 266.*

1. On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference.
2. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence.

DECIDED : March 22, 1901.

THE defendant had been tried for rape and found guilty, and sentenced to five years' imprisonment. An application had been made on his behalf to Würtele, J., the trial judge, to reserve a case (3 Can. Cr. Cas. 293), on the various grounds set out in the report, which application was refused.

The court of Queen's Bench (Appeal Side), on November 24, 1900, granted to the defendant leave to appeal, and a case was thereupon stated, pursuant to sec. 744 of the Criminal Code, by the trial judge.

The following statement of facts is taken from the case stated by the trial judge:—

“When taking evidence for the defence, the defendant's counsel endeavoured to prove that the injured party, Albina Soulière, on the 15th day of August, 1899, had met the defendant in the yard of the house in which she lived and had kissed him, and that her mother had ordered her to leave him and to retire into the house, and that she had struck her mother with a stick and had bitten her arm.

“I allowed evidence to be given respecting the injured party's conduct towards the defendant after the commission of the crime, not only on that occasion but also on all other occasions with respect to which the witnesses were questioned, but I refused to allow any evidence to be given respecting the assault which it was pretended had been committed by her on her mother, as not relevant to the issue. Olivine Payette swore that she had never seen the injured party, Albina Soulière, and the prisoner together after the 8th day of August, 1899, and Moise Jolivet stated that after that date he had seen them on one occasion seated near one another on one of the galleries, and that on another occasion he had seen the defendant's head on her shoulder, but he damaged his own character in giving this evidence as he had to admit that he was a drunkard and that he had been in jail seven or eight times, and the injured party, Albina Soulière, and her mother both denied that any familiarities had taken place between them after the commission of the crime. The mother and the daughter also denied that they had

ever had a wrangle, and that the latter had committed an assault on her mother. The only other witnesses who were questioned about the pretended wrangle and assault were Olivine Payette and Moise Jolivet, and the questions were objected to by the Crown Prosecutor; and as the mother, Marie Louise Paré, positively denied under oath that she had any knowledge that her daughter, Albina Soulière, had ever spoken to the defendant or had even met him after the 8th day of August, 1899, on which the crime had been committed, and as her evidence was uncontradicted, I held that whether there had been a wrangle and an assault or not, could not affect the positive evidence of the commission of the rape, and that the questions were therefore irrelevant to the issue, and I maintained the objection and disallowed them."

The other objections raised, and the facts relevant to same, appear in the judgment of Würtele, J., Vol. III. Can. Cr. Cas., page 293.

The questions of law submitted by the defendant by this appeal for the opinion of the Court of Appeal are the following:—

1. Whether proof of the complaint made by the injured party, Albina Soulière, to her mother, Marie Louise Soulière, about eight days after the date on which the rape was alleged to have been committed, should have been allowed?

2. Whether the injured party, Albina Soulière, could in making her complaint name the person whom she accused, and whether Marie Louise Paré in giving her evidence could mention the name of such person and narrate the particulars and circumstances stated when the complaint was made?

3. Whether the proof respecting the suits instituted by Marie Louise Paré and the injured party, Albina

Soulière, against Joseph Riendeau, the defendant's father, could be refused ?

4. Whether the court could refuse to allow proof to be made to the effect that the injured party, Albina Soulière, had sought to meet the defendant after the commission of the offence, and that she had quarreled with her mother, who wanted to prevent her from doing so, and had even assaulted her in order to accomplish her intention ?

5. Whether the presiding judge should not have drawn the attention of the jury to the question of doubt, and have instructed them on that point ?

MONTREAL, March 22, 1901.

The judgment of the Court was delivered by

OUMET, J.—

The appellant was tried upon a charge of rape, and was found guilty and sentenced to five years' imprisonment in the penitentiary.

He has appealed, and urges that his conviction was illegal and should be quashed for several reasons, amongst which is the following:—Because he was unduly and illegally hampered and restricted in his defence, the trial judge having refused the admission of relevant and material evidence offered by him.

The victim had admitted in her evidence that after the alleged rape she had several times seen and spoken to the accused. She was then asked if on one of these occasions her mother did not interfere and order her to go in, and whether she did not then refuse to obey the admonition of her mother, using towards her insulting language, and even beating her. The complainant positively denied

having insulted or assaulted her mother on the occasion mentioned. In the course of his defence an attempt was made by the defendant to contradict the last part of the complainant's evidence, and a question to that effect was put to one of the accused's witnesses. Objection was then taken by the Crown to the adduction of such evidence as irrelevant and tending to prove against the complainant facts foreign to the issue that could have no bearing on the case. This objection was maintained by the trial judge.

This Court is of opinion that the evidence thus offered by the accused was pertinent and material and should have been allowed. One of the elements constituting the offence of rape is the want of consent of the woman wronged. Such evidence tended to shew that instead of detesting and avoiding the accused, as should have been natural in the case of one who had been the victim of such an outrage to her dignity and honour as a woman, she was yet so desirous of his company that she angrily resented the interference of her mother when the latter wanted to put an end to what she considered an impropriety. It seems to us that such evidence in contradiction of a positive statement of the complainant should have a good deal of influence with the jury when weighing the sincerity of her evidence as a whole, and more especially as to that part of it in which she swears that she offered, to the commission upon her of the outrage she complains of, all the resistance that one could expect from a chaste woman. We, therefore, come to the conclusion that the defendant has been restricted in his defence, and has thereby suffered a material prejudice.

We do not think that it is necessary to allude to the other points raised, except to say that none of them could warrant our interference with the verdict.



The sentence and verdict are quashed and a new trial ordered.

*Order for new trial.*

**Note:** The order for a new trial in the above case proceeds upon a point upon which no stress was laid in the judgment of Wurtele, J., reported *ante*, Vol. III., page 293. The holdings appearing in the head note of that report are, in fact, confirmed by the appellate Court's statement that the "other points" raised would not warrant an interference with the verdict. Ed.

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[COUNTY COURT, FOR DISTRICT No. 2, NOVA  
SCOTIA.]

BEFORE HIS HONOUR FRANCIS G. FORBES, COUNTY JUDGE.

Re J. W. KING.

*Warrant of commitment—Naming place of imprisonment—Habeas corpus—Liquor License Act—R.S.N.S. ch. 100—Third offence—Illegal addition of costs of conveying to gaol to costs of conviction.*

1. A warrant of commitment is bad if it simply directs the gaoler to "imprison" the defendant for the stated time, without specifying the place of imprisonment.
2. The description of the place of imprisonment in a warrant of commitment is sufficient if the prison be described by its situation or some other definite description.
3. The costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction for a third offence under the Nova Scotia Liquor License Act.
4. Where the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant.

*The Queen v. Doherty* (1899), 3 Can. Cr. Cas. 505, distinguished.

DECIDED: March 27, 1901.

In this matter the petitioner presented a petition under the Act Relating to the Liberty of the Subject, ch. 181, R.S.N.S., and obtained an order *nisi* which was served on

the gaoler and the liquor license inspector to shew cause why the petitioner was detained in prison. The gaoler in his return shewed a warrant by a stipendiary magistrate for a third offence under the Liquor License Act, ch. 100 of R.S.N.S.

*C. W. Lane*, counsel for the prisoner, moved to quash the warrant and discharge the prisoner.

LIVERPOOL, N.S., March 27, 1901.

FORBES, Co. J.—

The defendant is held under a warrant for a third offence and it appears from the warrant that the defendant was convicted on the 15th of January, 1900, for a second offence, and for a third offence he was convicted on the 19th of February, 1900, of having sold between the 12th and 25th of January previous, and it is quite possible he was twice convicted for the same offence. This point would be well taken were it not that the warrant returned shews that the second conviction of the 15th January was for an offence committed on January 1st, therefore I cannot assume that he was again convicted of the same offence on February 19th, 1900.

Another ground argued was that the warrant was bad because it does not shew where the prisoner was to be confined for the space of ninety days. The warrant says: "At the termination of the space of two months, last above mentioned, to continue to imprison the said J. W. King, and keep him at hard labour, etc." A warrant must be certain and definite. At first I supposed the point was not tenable, because the warrant had in a previous clause directed the gaoler "to receive the said King" into the said common gaol and there to imprison him for two months, and the defective clause might be read with or declared a

part of the last named clause, but, on examination, I find the clause imposes a separate and distinct punishment for non-payment of a penalty, and really does not come into effect till the end of the first two months. Therefore the gaoler could under the present warrant at the end of two months, "continue to imprison" the defendant at any place he saw fit, and not in the common gaol.

Paley says, p. 337: "The commitment must be to the common gaol of the county for which the justices shall be acting." Again, "The warrant is sufficient if it describe the prison by its situation or some other definite description." In *Regina v. Smith*, 2 Str. 934: "The warrant is bad if it only orders in general terms that the defendant be carried to prison." In *Regina v. Nesbit*, 2 D. & L. 529: The commitment was held bad, because it authorized the police to keep the defendant in their custody till next session. I must, therefore, hold the warrant defective.

But the chief point on which the warrant is bad is that the warrant specially directs that the "costs and charges of conveying him to the said common gaol amounting to \$1 shall be sooner paid, etc.," and are to be collected in addition to the penalty of \$80 and costs of conviction. And I must hold that it is illegal to collect that or any sum for conveyance to gaol under a warrant based on a conviction for a third offence under ch. 100 R.S.N.S., the Liquor License Act, for the following reasons:

The only authority for collecting the charge is by virtue of sec. 135, which says, "if the costs of conveying the defendant to gaol are not sooner paid then imprison the defendant," and by sub-sec. 2 of sec. 135, it is enacted as follows: "Nothing in that section (*i.e.* 135) shall apply to cases where any term of imprisonment is imposed as a punishment in the first instance," that is, that sec. 135 cannot apply where a third conviction has been made and

the punishment of imprisonment for such third offence has been imposed.

Under sec. 115, which makes the Summary Convictions Act apply to ch. 100, the justice correctly imposes the costs of conviction, but that would not include by any straining of the sections the "costs of conveying to gaol," as the latter costs and charge is not incurred until the conviction is made up and a minute made and served, and a refusal to pay the fine must follow. I could not treat that clause in the warrant as "mere surplusage," as was done in *The Queen v. Doherty* (1899), 3 Can. Cr. Cas. 505; because here the sum is fixed and certain, and the defendant must pay it before being released if he chose to pay up rather than remain in custody. In *The Queen v. Doherty*, the court held if "no costs of commitment were allowed by law then the gaoler would demand none," hence the words were held "mere surplusage." I therefore hold the warrant bad, and will grant an order releasing the defendant with the usual clauses of protection to the gaoler and justice.

*Prisoner discharged.*

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## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, RITCHIE AND TOWNSHEND, JJ.,  
GRAHAM, E.J., AND MEAGHER, J.

**THE KING v. PATRICK WHITE.**

*Theft—Stealing “in or from” a building—One offence only—Conviction on summary trial—Right to habeas corpus—Refusal to discharge—Subsequent application to Judge of Supreme Court of Canada—Co-ordinate jurisdiction of—Cr. Code secs. 752, 798, 800, 955.*

1. A conviction for stealing “in or from” a building charges only one offence and is not, because of the disjunctive, void for duplicity and uncertainty.
2. Per Sedgewick, J. (S. C. of Canada)—The jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus is not an appellate jurisdiction over provincial courts, nor does it extend further than to give such judge equal and co-ordinate power with a judge of the provincial court.

ARGUED: March 4, 11 and 12, 1901.

DECIDED: April 12, 1901.

Motion under ch. 181 Revised Statutes of Nova Scotia, 1900, on the return of a habeas corpus and a certiorari in aid thereof (issued by Graham, E.J., returnable before the court in banco) for the discharge from custody of the defendant, a prisoner in the city prison at Halifax under a warrant of commitment reciting a conviction made under Part LV. of the Criminal Code.

The conviction is as follows:—

“Be it remembered, that on the 9th day of February, in the year of our Lord One Thousand Nine Hundred and One, in the police court in the said city of Halifax, Patrick White, being charged before me, the undersigned stipendiary magistrate and a justice of the peace for the said city of Halifax, for that he, the said Patrick White, in the said city of Halifax, on the 6th day of February, A.D. 1901, did steal nine bottles of whiskey of the value of

nine dollars, in or from a certain railway building, to wit, a **certain building** at the deep water terminus, in the said city of Halifax, belonging to the Intercolonial Railway of Canada, and the said Patrick White having consented to my trying the said charge summarily is at the time and place first above mentioned convicted before me of said offence, and I adjudge the said Patrick White for his said offence to be imprisoned in the city prison, in the said city of Halifax, and there to be kept at hard labour for the space of nine months.

Given under my hand and seal, the day and year first above mentioned at Halifax, in the County of Halifax, aforesaid.

GEORGE H. FIELDING (L.S.),

Stipendiary Magistrate in and  
for the city of Halifax.

HALIFAX, N.S., March 11, 1901.

*F. F. Mathers*, for the prosecutor, took the preliminary objection that a habeas corpus would not lie in view of sec. 798 of the Code, citing *Re Sproule*, 12 Can. S.C.R. 140, and *Re Ferguson*, 24 N.S.R. 106.

*J. J. Power*, for the prisoner, cited in answer to the objection Revised Statutes of Nova Scotia, 1900, ch. 181, secs. 1, 2, 3; *R. v. St. Clair*, 3 Can. Cr. Cas. 551 (Ont.); *R. v. Gibson*, 2 Can. Cr. Cas. 302; 29 Ont. R. 660; Hurd on Habeas Corpus, pp. 84, 85, 86, 87, 415, 353, 388, 399; *Christie v. Unwin*, 11 A. & E. 379. On the merits it was objected on the prisoner's behalf that the conviction was bad for duplicity and uncertainty, and that the offence was charged in the alternative as theft "in or from" a railway building and that the prisoner should have been committed not to the city prison but to the

common jail citing Code secs. 351, 785 (as amended), 539, 540, 800, 782, 782 (b), 955 (2); N.S. Acts, 1854, ch. 46. Marshall's N. S. Justice, p. 83; C. C. secs. 312, 322, 335, 352, 376 (a), 466 (a), 503 (b), 523 (e), 525 (c); Paley, 7th ed., pp. 177, 178, 197, 198; *Cotterill v. Lempriere*, 24 Q.B.D. 637; *R. v. Craig*, 21 U.C.Q.B. 552; Archbold Criminal Practice, pp. 487, 488; *R. v. North*, 16 D. & R. 146, per Bayley, J.; *Rogers v. Richards*, [1892] 1 Q.B. 155; *R. v. Randolph*, 4 Can. Cr. Cas. 165; 32 Ont. R. 212.

*F. F. Mathers*, for the prosecutor, cited Code secs. 798; 3 (j) & (l); 612, 734, 626, 627, 711, 712, 713, 714, 715, 752; *R. v. Kavanagh*, 27 U.C.C.P. 537; *R. v. Burke*, 1 Can. Cr. Cas. 539 (N.S.); Roscoe's Criminal Evidence, 12th ed., p. 178; *Ex parte Krans*, 1 B. & C., 258, 261; *R. v. Marks*, 3 East 157; *Re Anderson*, 11 U.C.C.P. 56.

*J. J. Power*, in reply, contended that this prisoner was not in custody "charged" under sec. 752, and cited secs. 546, 568, 579, 601, 605 where the word "charged" is used in the same sense. Graham, E.J., gives the rule of construction in *R. v. Gibson*, 29 N.S.R. 17; *R. v. Randolph*, 4 Can. Cr. Cas. 165, 32 Ont. R. 212. Sec. 800 is the only curative section that applies to Part LV., according to the maxim *Expressio unius est exclusio alterius*

HALIFAX, April 12, 1901.

WEATHERBE, J. (dissenting).—

The conviction is bad and the accused is entitled to be discharged.

I am convinced that under the authorities cited by Mr. Power there are two crimes charged in the alternative and the case is clearly within those cases and the reasons on which they are based.

The alleged curative statutes, it is admitted, do not directly apply. It seems to me they were not intended to apply and, upon a familiar principle of construction, this case is excluded from their operation.

RITCHIE, J.—

In my opinion only one offence is charged in the warrant, and the city prison is authorized by the statute as a place of imprisonment for offenders convicted by the stipendiary magistrate of the city of Halifax.

The application for the discharge of the prisoner should be refused.

TOWNSHEND, J.—

I concur in the view of Mr. Justice Ritchie that there was only one crime charged, and that the place of detention was a proper place within the meaning of the law.

GRAHAM, E. J. (dissenting).—

This is an application to discharge a defendant upon a writ of habeas corpus. The defendant was tried before the stipendiary magistrate for the city of Halifax under the provisions of the Code relating to summary trials. In the conviction the crime is set out as a charge of stealing whiskey "in or from" a railway building. There would be no objection to making such a statement in the disjunctive if the words "in" and "from" were synonymous. In this context I think these words are not synonymous.

In Archbold's Criminal Law, page 487, dealing with a statute in respect to stealing goods *in* any vessel, etc., it is



said: "Prove that the goods were at the time *in* the ship described in the indictment. The words of the statute are *in* any vessel, and it is, therefore, immaterial whether the defendant succeeded in taking the goods from the ship or not if there was a sufficient asportation *in* the ship to constitute larceny."

And on page 488 in dealing with a statute in respect to stealing goods *from* a dock the same author says:—"Prove that the goods were taken *from* the dock, etc., for which purpose a mere removal such as would be sufficient to constitute simple larceny will not suffice, for the words of the statute are *from* the dock, etc., to satisfy which there must be an actual removal from the dock, etc., in the same manner as where an indictment is for stealing from a person." Upon that ground I think the conviction is bad.

The curative statutes enabling crimes to be set out in the alternative, as in indictments or informations, do not in my opinion apply to this conviction, and no statute has been pointed out which does apply to it.

Then it is said that the statute provides that this conviction is to have the effect of a verdict in a superior court, but it has been decided in Ontario that such a conviction may be reviewed upon certiorari. If this is correct law I think there can be no objections to discharging the defendant upon habeas corpus. The defendant ought to be discharged.

MEAGHER, J.—

I agree with Mr. Justice Ritchie and Mr. Justice Townshend that there is but one crime charged and that the city prison is the proper place of confinement, and if it was intended to create two crimes and distinguish

between the station and the building there would be two statutes as in England. They are used in the same section here, and I think in the same sense.

*Discharge refused.*

NOTE.—A substantive application was subsequently made for the prisoner's discharge to SEDGEWICK, J., of the Supreme Court of Canada who refused the same, giving his reasons therefor in the following written opinion :—

SEDGEWICK, J.—

The applicant is confined in a Nova Scotia jail by virtue of a conviction of the stipendiary magistrate of the city of Halifax for stealing certain goods "in or from" a warehouse belonging to the Intercolonial Railway. He first applied to the Chief Justice of the province for a writ of habeas corpus which was refused.

Then he applied to Graham, J., who referred the matter to the Supreme Court. After argument and due consideration his application was again refused, two judges dissenting. No appeal was taken either to the Judicial Committee of the Privy Council or to the appellate court of the Dominion.

He now renews his application to me—a judge of the Supreme Court of Canada—under sec. 32 of the Supreme and Exchequer Court Act. That section may give me all the power which the common and statute law gives to judges of the superior courts in matters of habeas corpus, but it does not constitute me a Court of Appeal with jurisdiction to void or reverse judgments of the Supreme Court of Nova Scotia. If I have in the premises equal and co-ordinate power with a judge of that court, my power most certainly does not extend further. The suggestion is almost impertinent, but were either of the

two judges of the provincial courts, (who, until now, have had no part in this matter,) to grant the writ, and in spite of the judgment of the Supreme Court and in vindication and assertion as well as of his autonomy as of his possibly superior and conceivably infallible knowledge of law, to release the prisoner, his action, violating elementary principles as to legal authority and precedent, would be open to not undeserved censure. In the case supposed he would unhesitatingly and without question accept as law the judgment of his court. And what he should and would do I must also do. Even if I thought the imprisonment illegal (which I do not) I would not, and under the circumstances above stated I cannot, interfere. The application is refused.

*Discharge refused.*

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## [COURT OF APPEAL FOR ONTARIO.]

Before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, JJ.A.

**THE KING v. MARCOTT.**

*Fortune telling—Spiritualistic “readings”—“Undertaking” to tell fortunes  
—Deception an essential element—Crim. Code, sec. 396.*

1. Deception is an essential element of the offence of “undertaking to tell fortunes” under sec. 396 of the Criminal Code, and to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

APPEAL by the defendant upon the following case stated by His Honour Judge McDougall:

The prisoner was tried before me as chairman of the general sessions of the peace for the county of York and a jury on the 13th and 14th of December, A.D. 1900, and convicted upon an indictment charging that she the said Delina Marcott at the city of Toronto in the county of York, on the seventeenth day of October in the year of our Lord one thousand nine hundred, unlawfully did undertake to tell fortunes, contrary to the Criminal Code, sec. 396.

The principal witnesses for the Crown were two young ladies, Kate Arksey and Jessie Bartlett, who went together to the house of the accused at number 122 McCaul street in the said city, where they swore that they made appointments with Mrs. Marcott to have an interview or “reading” on the 17th of October. They accordingly called together on the evening of the 17th of October when Mrs. Marcott had an interview with each of the witnesses separately, the other witness remaining down-

stairs in each case while the interview with Mrs. Marcott took place in an upstairs room. Miss Arksey swore that she had gone for the purpose of having her fortune told, and that in response to a question Mrs. Marcott had told her that she gave readings and answered questions. Miss Arksey asked her some questions concerning her health, and also as to whether she was going to get any money left her, and whether she was going to get married. In reply to the latter questions Mrs. Marcott told her that she was going to get a small sum of money but not very soon; that she was to be married and would be settled in about two weeks; that the man she was to marry was of medium size, not very dark and sharp featured. Miss Arksey paid Mrs. Marcott the sum of fifty cents. The latter told her if she came back in about two weeks' time she would give a "reading" in a trance which would cost a dollar.

The second witness, Miss Bartlett, swore that after waiting for Miss Arksey she (the witness) had gone upstairs when Mrs. Marcott told her to ask questions. The first question was as to whether the witness would go on a trip to the old country, to which Mrs. Marcott replied that she could see there were three trips for her, one within the space of three months, and the other within the space of three years, and that she was to cross deep water. She (Mrs. Marcott) said in answer to a question that she got her information from the spirit world. When questioned as to how long Miss Bartlett would live, the answer was to eighty or ninety years of age. In reply to a question as to whether the witness would get married and what her husband's employment would be, Mrs. Marcott said, "Aren't you married? I get with you that you are married." On the witness saying that she was not married at all, Mrs. Marcott continued, "I get with you two husbands," one a dark gentleman living in a south-

west direction (from where they were) and with a very determined disposition. Mrs. Marcott further said that the witness would get money at two different times, and added that she found it difficult to answer the witness's questions because the witness was a very decided person, and because she had not come on the right day, her birthday happening on the 6th of the month. Mrs. Marcott said she ought to have come on the 24th, because she could not get the impressions with her. This witness also swore that she paid Mrs. Marcott fifty cents, getting change for a dollar bill. Mrs. Marcott said she would give her fuller readings if she came at another time when she would go to sleep. She could tell as far in the future as she could see and back as far in the past as she could see when she went to sleep, and that her powers came from the spirit world, but this reading would cost a dollar. It appeared that both women had been employed by the city police to ascertain if the prisoner was carrying on the business of fortune telling and if so to procure evidence of the fact; and were furnished with one Irwin, a member of the force, with the money with which to pay for the "readings."

At the conclusion of the case for the Crown it was urged by Mr. DuVernet, of counsel for the defence, that it was of the essence of the offence that the Crown should shew that there was fraud or deception or some false pretence, and that in the absence of any evidence of this the accused should not be convicted, it being contended that the word "pretend" in sec. 396 of the Code was intended to apply to all the matters specified in that section and that the same effect should be given to it as to the clause in the English statute under which it was only an offence where the act complained of was done "to deceive or impose on any of Her Majesty's subjects," following the judgment in *Monck v. Hilton* (1877), 2 Ex. D. 268.

On behalf of the Crown it was urged that the word "pretend" did not apply to the undertaking to tell fortunes, but that what was aimed at was the business of fortune telling, and that any person who undertook to foretell future events relating to the fortune and life of more than one individual came within the proper meaning of the section of the Code under which the indictment was laid.

I overruled the objection and allowed the case to go to the jury who found the prisoner guilty, but at the request of counsel for the defence I have reserved the following question for the consideration of the Court of Appeal for Ontario :

Was I right in law in allowing the case to go to the jury upon the evidence for the Crown as above stated ?

TORONTO, June 3, 1901.

*E. E. A. DuVernet*, for the appellant.

*J. R. Cartwright*, K.C., for the Crown.

TORONTO, June 20, 1901.

ARMOUR, C.J.O.—

The prisoner was convicted upon an indictment charging her with unlawfully undertaking to tell fortunes, contrary to the Criminal Code, sec. 396, and the question reserved by the chairman of the court of general sessions of the peace at which she was convicted was whether he was right in law in allowing the case to go to the jury upon the evidence for the Crown set out in the case.

Mr. DuVernet, for the prisoner, contended that (1) deception must be proved ; (2) that it must be deception by

means of some kind of witchcraft, sorcery, enchantment, or conjuration; (3) that there must be evidence of an undertaking, that is, proof either (a) of contract or (b) of deception.

The Imperial Act of Geo. II., ch. 5, after providing for the repeal of certain Acts therein named, and after enacting by sec. 3 that on and after the 24th day of June, 1735, no prosecution, suit or proceeding should be commenced or carried on against any person or persons for witchcraft, sorcery, enchantment or conjuration, or for charging another with any such offence in any court whatsoever in Great Britain, provided, by sec. 4, as follows: "And for the more effectual preventing and punishing any pretences to such arts or powers as are before mentioned whereby ignorant persons are frequently deluded and defrauded, be it further enacted by the authority aforesaid that if any person shall from and after the said 24th day of June pretend to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration or undertake to tell fortunes or pretend from his or her skill or knowledge in any occult or crafty science to discover when or in what manner any goods or chattels supposed to have been stolen or lost may be found, every person so offending being thereof lawfully convicted on indictment or information in that part of Great Britain called England, or on an indictment or libel in that part of Great Britain called Scotland, shall for every such offence suffer imprisonment by the space of one whole year," etc.

This statute was held to be in force in this Province in *Regina v. Milford* (1890), 20 Ont. R. 306.

And sec. 396 of the Criminal Code is a transcript of the enactment contained in the section above quoted.

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and



a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete.

The offence of undertaking to tell fortunes aimed at by this enactment does not in principle differ in my opinion from the offence of pretending or professing to tell fortunes aimed at by the Imperial Act 5 Geo. IV., ch. 83, which provides that "every person pretending or professing to tell fortunes or using any subtle craft, means, or device by palmistry or otherwise to deceive or impose on any of His Majesty's subjects shall be deemed a rogue and vagabond" and punished as the Act provides.

And in *Regina v. Entwistle*, [1899] 1 Q.B. 846, which was an application for a writ of certiorari to bring up and quash the conviction of Georgina Jones who was charged under this Act upon an information which alleged that she did pretend or profess to tell fortunes contrary to the form of the statute, and the objection was taken "that no intent to deceive or impose on any of Her Majesty's subjects was alleged in the information or in the conviction," Darling, J., in giving judgment, said: "In *Monck v. Hilton*, 2 Ex. D. 268, Cleasby, B., said: 'The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so).' I agree with that. I think that the use in the statute of the words 'pretending or professing to tell fortunes,' without resorting to that part of the statute which contains the words 'to deceive and impose on,' does import that deception is practised by doing so. In my opinion if a person were to say, 'I am not a real fortune teller; I cannot tell fortunes; what I am about to tell you must not deceive in any way, but I will pretend

or profess to tell your fortune by the use of the ordinary means which people use to tell fortunes,' then no offence would be committed, because if an offence were charged, it would be a sufficient defence to prove that there was no intention to deceive, but that what was done was done simply as an amusement. But the words of the Act of Parliament are wide enough to cover intent to deceive, and I think they do import that deception was practised. I agree with the passage which I have cited from the judgment of Cleasby, B., whether what he said was *obiter dictum*, and unnecessary for the decision of the case then before the Court, or not. I think that what he said is good sense and good law, and I agree with it, whether it is binding on me or not."

And Channell, J., said: "I think that in order to render a person liable to conviction on such a charge as this the act must have been done in order to deceive and impose on some one; but this is so, not because the latter words 'to deceive and impose on' apply to the words 'pretending or professing to tell fortunes,' but because the intent is included in the words 'pretending or professing.' If there is not deceit there is not any pretending or professing. I think those words mean representing with the intention that the representation should be believed."

I am of the opinion that the words "undertakes to tell fortunes," equally with the words "pretending or professing to tell fortunes," import that deception is practised by doing so, and that the person undertaking to tell fortunes represents that he has the power to do so with the intention that such representation should be believed.

In the case therefore of a person charged with the offence of undertaking to tell fortunes under sec. 396 of the Code there must be evidence from which the jury may reasonably find that such person in so undertaking was

asserting or representing, with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

And I am of the opinion, therefore, that the learned chairman was right in law in allowing the case to go to the jury upon the evidence for the Crown as above stated.

OSLER, J.A.—

We must construe sec. 396 of the Criminal Code as we find it there. "An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein": *Robinson v. Canadian Pacific R.W. Co.*, [1892] A.C. 481. One of the offences mentioned in the section is the pretending to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration; another (quite different from that) is the undertaking to tell fortunes; and a third, the pretending from skill and knowledge in any occult or crafty science to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

The defendant was convicted of the second of these offences. That fraud, deception or false pretence of some kind is an essential element of the offence I am satisfied. Section 396 is the last clause of Part XXVIII. of the Code, which contains a group of sections under the title "Fraud," relating to and dealing with various phases of that offence. We have no right to read that word out of the section and to say that the business or practice of fortune telling is what is struck at dissociated from any attempt to deceive or defraud thereby.

Whether the learned Judge overruled the objection of the defendant's counsel as set forth in the case on the ground that there was some evidence of fraud, deception or false pretence, or on the ground that it was not necessary that such should be shewn, the case does not state. If on the latter ground I think he was wrong. We do not know how the jury were directed; we are only asked to say "whether he was right in law in allowing the case to go to the jury on the evidence for the Crown as stated."

To "undertake" to tell fortunes, according to one of the common meanings of the word, is to assert or profess a power or ability to do so, which as Denman, J., says, in delivering the judgment of the Court in *Penny v. Hanson* (1887), 18 Q.B.D. 478, is something which no sane man can believe in these times, and where such profession, assertion, or undertaking is made for reward, or, as in the case just cited, with intent to deceive, the offence is complete, since the person so undertaking must know that he has no such power.

The case just cited was under a different statute from that from which sec. 396 of this Code is said to have been taken. The evidence was provided by a detective, but the Court said that the magistrate was right in convicting and that there was an intent to deceive on the part of the appellant in professing his ability, in the manner disclosed by the evidence, to tell the fortune of the detective. The case of *Regina v. Entwistle* (1899), 19 Cox C.C. 317, may be referred to.

In the case at bar there is evidence that the defendant undertook for reward to tell fortunes which she must have known that she had no power to do, and that was enough to send the case to the jury, even though the people whose fortunes she undertook to tell were the wretched women Arksey and Bartlett who were suborned by the police-

man Irwin to entrap the accused into committing a breach of the law.

The question submitted must be answered in the affirmative.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

*Conviction affirmed.*

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[COURT OF KING'S BENCH, QUEBEC.]

(DISTRICT OF MONTREAL.)

BEFORE WÜRTELE, J.

**THE KING v. BARSALOU (No. 3).**

*Joint indictment—Order of defence—Degree of criminality—Order of names in indictment—Discretion of judge—Evidence for co-defendant—Use for and against other defendants—Cross-examination of co-defendant's witnesses—Time for—Cr. Code sec. 661.*

1. Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge.
2. Where there is a difference in degree of criminality with respect to the charge made against several persons jointly indicted, they should be called upon for their defence the greater before the less according to the seriousness of the charge against each as disclosed both by the indictment and the evidence for the prosecution, *ex. gr.*, the principal before the accessory, and the thief before the receiver.
3. Where there appears no such difference in degree of criminality in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment.
4. The evidence adduced by the witnesses called on behalf of any defendant is effective as regards the others, whether beneficially or adversely, and counsel for the other defendants may therefore cross-examine such witnesses before their cross-examination by counsel for the prosecution.

DECIDED: March 19, 1901.

Three prisoners were on trial together, charged jointly with arson, and the Crown had closed its case. The

defendants were then called upon to declare whether they intended to adduce evidence or not; the advocates who had appeared for David Barsalou and Bertha St. Pierre declared that they intended to put in evidence and Onézime Pelletier, the third prisoner, who was not represented by counsel, made a similar declaration on his own behalf. Thereupon the counsel for the prisoner Barsalou was called upon to proceed with his defence. He, however, objected to the course adopted and contended that the defence was common to the three prisoners, that the witnesses could be called generally and not specially for any one in particular of the prisoners, and that they could not be restricted to proceed individually one after the other. The counsel for the Crown on the other hand maintained that each prisoner should enter separately on his defence.

MONTREAL, March 19, 1901.

WÜRTELE, J.—

When several accused persons are jointly indicted and tried there may be facts which are favorable to some and not to others, and then the position of all the accused may not be the same, as the degree of criminality may differ, and it is only just that each of them should be entitled to make a separate defence. The law therefore gives them this right and such right is clearly shewn in sec. 661 of the Criminal Code which says:—"If any one of *several* accused persons, being tried together, is defended by counsel, such counsel shall, at the end of the case of the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person *for whom he appears*." It is the duty of the Court to see that they

have an opportunity to exercise their right of separate defence.

The contention that the defence is common when several accused persons are tried together is unfounded, and the only question is as to the order in which the accused persons shall enter on their respective defences.

In England the practice has not always been uniform ; in some cases the order of the defences was determined by the seniority of the counsel engaged, in other cases the order in which the defendants were named in the indictment was followed, and, again, in certain cases, the order of the defences was determined by the degree of criminality imputable to each of the defendants. Finally, however, it became the rule that the order of the defences should be in the order in which the names of the accused persons are placed in the indictment when the degree of criminality is the same for all the defendants (*The Queen v. Barber*, 1 C. & K. page 434), and that in the latter case the judge should call upon the defendants for their defence according to the nature of the charge against each of them individually as disclosed by the indictment or the evidence of the prosecution or by both. But the choice of one or of the other of these two modes is largely left to the discretion of the Judge. The evidence adduced by the witnesses or any one of the defendants is effective as regards the others either beneficially or adversely, and, therefore, before the counsel for the prosecution cross-examines, each of the other defendants has the right to cross-examine such witnesses and in doing so to bring out fresh facts which may be advantageous for his defence.

Mr. Justice Erle, in the case of *The Queen v. Meadows*, and others, in 1856, which is reported in the new series of *The Jurist*, Vol. 2, page 718, said: "In a case before Lord Tenterden in which I was counsel, it was held that the

priority of defence should be determined by the priority of the names of the prisoners in the indictment; and I have ever since understood that to be the rule. Attention must, however, be paid to the precise offence with which each prisoner is charged: for instance, the principal should make his defence before the accessory, and the thief before the receiver, and such like; but then when an indictment is drawn by a knowing man he usually puts the principal person first."

But, as I have remarked before, the order of the defence is left generally to the discretion of the Judge. Now, in the present case, the nature of the offence charged is the same with respect to the three defendants and, therefore, I must apply the rule which determines the order of defence by the order in which the names of the defendants appear in the indictment. The first named is David Barsalou and I now call on his counsel for his defence.

*O. Desmarais*, K.C., and *J. P. Cooke*, K.C., for the Crown.

*H. C. Saint Pierre*, K. C., and *P. M. Durand*, for the defendant Barsalou.

*J. A. Saint Julien*, and *J. C. Walsh*, for the defendant Bertha Saint Pierre.



## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., AND STREET, J.

**BOTHWELL v. BURNSIDE.**

*Appeal from summary conviction—Order for costs of appeal—Jurisdiction of General Sessions—Time of making order—When costs must be taxed at same sittings—Order nunc pro tunc—Parties to the appeal—Police officer prosecuting for benefit of municipality—Crim. Code secs. 880, 884, 897, 898.*

1. Where an appeal to a Court of General Sessions of the Peace from a summary conviction is not proceeded with, an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given ; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed *nunc pro tunc* at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings.
2. Where an appeal from a summary conviction has been heard and determined and a minute made by the chairman of the Sessions dismissing the same with costs and directing the clerk to tax the same, but no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the Court of General Sessions directing a distress for the costs taxed are irregular, and will be quashed.
3. Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation.

ARGUED : March 6, 1900.

DECIDED : April 10, 1900.

Thomas Burnside was convicted before the police magistrate of the town of Bothwell, on the 12th day of May, 1899, for an offence against a by-law of the town on the information of John Colthurst, the chief of police, and from this conviction he appealed to the Court of General Sessions of the Peace for the county of Kent, held on the 13th day of June, 1899, on which day the appeal was

entered and came on for trial at an adjourned sitting of the Court on June 29th, 1899, before the chairman alone, no associate being present, when judgment was reserved until July 4th, 1899, the sittings of the court having been adjourned until July 10th, 1899, when that sittings ended.

On July 4th, 1899, the learned chairman gave judgment and signed the following minute thereof: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days."

Taxation of these costs was commenced on July 8th, 1899, and was not completed by the clerk of the peace till July 13th, 1899, the appellants' counsel objecting that the court and not the clerk of the peace should tax the costs. The appellants' counsel also objected that the taxation could not be proceeded with as the sittings were over.

On July 15th, 1899, the following certificate was issued by the clerk of the peace:—

In the matter of appeal between Thomas Burnside, *Appellant*, v. The Town of Bothwell, *Respondent*.

I hereby certify that at a Court of General Sessions of the Peace holden at Chatham, in and for the said county, on June 13th, 1899, last past, an appeal by Thomas Burnside against a conviction of George Taylor, Esquire, one of Her Majesty's Justices of the Peace in and for the said county, came on to be tried and was then heard and determined, and the said Court of General Sessions thereupon ordered that the said conviction should be sustained and that the said appeal be dismissed, and that the appellant should pay to the said respondent the sum of sixty-four dollars and thirty-five cents for his costs incurred by him in the said appeal, including the fees to the clerk of the peace for his costs on said appeal, and which sums were thereby ordered to be paid to the said clerk of the peace of the said county forthwith to be by

him paid over to the respective parties entitled thereto. And I further certify that the said sums for costs have not nor has any part thereof been paid in obedience to said order.

Dated the 15th day of July, 1899.

Wm. Douglas,

Clerk of the Peace. [L.S.]

At the next sittings of the said Court of General Sessions of the Peace holden on the 12th day of December, 1899, the following order was made:—

In the Court of General Sessions of the Peace in and for the County of Kent.

|                       |   |  |
|-----------------------|---|--|
| His Honour Judge Bell | } | Wednesday, the 13th day of<br>December, A.D. 1899. |
| In Court.             |   |  |

In the matter of an appeal between The Town of Bothwell, *Respondent*, v. Thomas Burnside, *Appellant*.

Upon the application of the respondents by their solicitor, upon reading the notice of motion and an affidavit of service of the said notice of motion on Messrs. Wilson, Kerr & Pike, solicitors for the appellant, and the certificate of the clerk of the peace:—

It is ordered that a warrant of distress be issued, directed to all or any of the constables and other peace officers of the county of Kent to distrain the goods and chattels of the above named appellant, Thomas Burnside, and to realize from the sale of the said goods and chattels the amount of the costs of the respondents herein, as shewn by the certificate of the clerk of the peace in and for the county of Kent, unless such costs are sooner paid.

By order of the Court.

Wm. Douglas, C.P.C.K.

The above recited certificate and order having been certified to this court, Mr. DuVernet, on February 21st, 1900, obtained an order nisi calling upon His Honour

Judge Bell, chairman of the General Sessions of the Peace for the county of Kent, William Douglas, clerk of the peace for the county, the town of Bothwell, above named, and John Colthurst, the informant, to shew cause why any and every order issued and direction made by the learned chairman of the General Sessions of the Peace in connection with the appeal taken by Thomas Burnside to quash the conviction made against him, upon the information and complaint of John Colthurst, should not be quashed, with costs, upon the following, amongst other grounds:—

1. The learned chairman of the General Sessions of the Peace was at the December sittings so far as regards this matter *functus officio*.

2. There having been a recognizance duly entered into by the appellant conditioned to abide by such judgment of the court as should be pronounced upon the appeal, no certificate by the clerk of the peace that the costs awarded against the appellant had not been paid could be rightfully claimed, nor could any distress warrant legally issue for the collection of the costs.

3. The learned chairman in any case had no power to personally direct the issue of a distress warrant.

4. The enforcing of the costs under the circumstances could only have been by process of the court.

5. The order for costs on the appeal was invalid for not appointing any person to whom or time when they should be paid.

6. The taxation founded upon such order for costs was unwarranted and illegal in that it was neither conducted during the sittings of the court nor adopted by it.

7. Such taxation should have been conducted in the court itself while sitting, and not in the private office of the clerk of the peace.

8. The said certificate that costs had not been paid was

insufficient for not reciting the time at which they were to be paid and the fact of its expiration without payment.

9. The respondent having procured the issue of the magistrate's distress warrant after the June sittings<sup>†</sup> was precluded from subsequently invoking the jurisdiction of the learned chairman of the Sessions for a like purpose.

10. The conviction against which the appeal was taken was bad on its face, and could afford no warrant for any order, providing either for the collection of the original fine and costs or the costs of the appeal.

11. The town of Bothwell not having been the informant before the magistrate, could not claim or be granted costs.

TORONTO, March 6, 1900.

*DuVernet*, for the defendant, contended that costs must be taxed at the same session at which a case is disposed of; that the judge himself should have taxed the costs and included them in the order during that session: *In re Rush and Corporation of Bobcaygeon* (1879), 44 U.C.R. 191; *The Queen v. Murray* (1867), 27 U.C.R. 134; *In re McCumber and Doyle* (1867), 26 U.C.R. 516; *The Queen v. Justices of Staffordshire* (1857), 26 L.J.N.S. (Mag.) 179; *The Queen v. George Long* (1841), 1 Q.B. 740; *The Queen v. Justices of the West Riding* (1865), 34 L.J.N.S. (Mag.) 142; *King v. Justices of Leicestershire* (1813), 1 M. & S. 442; *Regina v. McIntosh* (1897), 28 O.R. 603; *Suffolk County Lunatic Asylum v. Guardians of the Stow Union* (1897), 76 L.T. 494; and that in any case the town of Bothwell had no right to an order for these costs: *Haacke v. Adamson* (1864), 10 U.C.L.J. 270.

*J. H. Moss*, for the prosecutor, contended that the taxation of the costs was a purely ministerial act; that

the English cases did not apply to Courts of Session in this Province; and that if there had been error in naming the town of Bothwell as respondent, it was only error in procedure: *The Queen v. Binney* (1853), 1 E. & B. 810.

TORONTO, April 10, 1900.

The judgment of the Court was delivered by

ARMOUR, C.J.:—

The Criminal Code, sec. 880*b*, provides that the appellant shall give to the respondent or to the justice who tried the case for him a notice in writing in the form NNN. in schedule 1 to this Act of such appeal within ten days after such conviction or order.

Colthurst was the informant and Taylor was the justice who tried the case for him and to whom the notice of appeal was given. Burnside was therefore the appellant and Colthurst was the respondent: *The King v. Justices of Hants* (1830), 1 B. & Ad. 654; *The Queen v. Smith* (1860), 29 L.J.M.C. 216; *The Queen v. Purdey* (1864), 34 L.J.M.C. 4. And by sec. 899 of the Criminal Code an appellant may abandon his appeal by giving to the opposite party notice in writing, etc., "the opposite party" being clearly in this case the informant Colthurst, and therefore the respondent, and if the conviction had been quashed with costs the court must have ordered Colthurst to pay them, and could not have ordered the town of Bothwell to pay them.

The proceedings, therefore, subsequent to the dismissal of the appeal, were in my opinion improperly entitled.

All that appears to have been done upon the learned chairman giving judgment dismissing the appeal was the signing by him of the following minute: "Appeal in this

case dismissed with costs to be taxed by the clerk of the peace within five days," and no formal order of the Court of General Sessions of the Peace was ever drawn up and made in pursuance of such minute as should have been done in compliance with the Criminal Code, sec. 880e and sec. 897, and which should have contained the amount of the costs awarded. There was, therefore, no warrant or authority for the certificate of the clerk of the peace, or for the order of the Court of General Sessions of the Peace brought before us, and they must be quashed.

Sec. 880e and sec. 898 seem somewhat in conflict, as did sec. 27 of the Imperial Act, 11 & 12 Vict. ch. 43 and sec. 5 of the Imperial Act, 12 & 13 Vict. ch. 45; but in *Freeman v. Read* (1860), 9 C.B.N.S. 301, the court held that the clerk of the peace might grant his certificate that the costs had not been paid whether the person ordered to pay the same had been bound by any recognizance conditioned to pay such costs or not, so that had there been a formal order of the Court of General Sessions of the Peace for the payment of the costs in this case to support it the certificate might have been upheld, although the appellant was bound by recognizance conditioned to pay them.

Appeals from summary convictions, and the costs payable in respect thereof, are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different.

In *The Queen v. The Justices of Staffordshire* (1857), 7 El. & Bl., at p. 939, Coleridge, J., said: "The first Act giving power to the Sessions to grant costs (on appeals) was, I think, statute 8 & 9 Wm. III. ch. 30, sec. 3; and it carefully confines the power to grant costs to the justices at the same sessions; and many subsequent Acts giving costs refer back to this, so as to tie up the power in the same way. The Act giving power to award costs in the

present case is statute 12 & 13 Vict. ch. 45, sec. 5; this enacts that upon every appeal to the Sessions 'the court before whom the same shall be brought may, if it thinks fit, order and direct' the unsuccessful party to pay costs. The words of the Act restrict the power to that court."

And Lord Halsbury, in *Midland R. W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q.B. 357, points out (at p. 362) the reason of this: "The Legislature knew very well that whatever may be the identity of the court as an abstraction, it occasionally consists of different persons, and they have accordingly provided that the power to order costs shall be exercised by the court before which the appeal is tried."

By statute 8 & 9 of Wm. III. ch. 30, sec. 3, the justices in their General or Quarter Sessions of the Peace were authorized to award such costs and charges in the law as by the said justices should be thought "most reasonable and just."

And by 12 & 13 Vict. (Imp.) ch. 45, sec. 5, the Court of General or Quarter Sessions of the Peace were empowered upon any appeal to award such costs and charges as might appear to such court "just and reasonable." It is obvious, therefore, that the duty of determining what costs were "just and reasonable" was a judicial duty which they could not delegate. But it soon became the practice for the clerk of the peace to tax the costs and for the court to adopt the amount taxed by him and to insert it in their order, but this had to be done during the same sessions.

In *Ex parte Holloway* (1831), 1 Dowl. P.C., at p. 27, Parke, J., said: "It is every day's practice for the clerk of the peace to ascertain the amount of costs to be allowed. How could the justices do it themselves." *Sellwood v. Mount* (1841), 1 Q.B. 726.



It then became the practice for the parties to consent to the taxation of the costs by the clerk of the peace out of sessions, and by their so doing this implication arose, that the justices dismiss the appeal with costs and say to the parties, "the clerk of the peace will settle the amount and it will be inserted in the order afterwards; are you content?" and they make no objection: *The Queen v. Mortlock* (1845), 7 Q.B. 459, at p. 471. And where there was such consent, express or implied, the courts would not permit the fact that the costs were taxed by the clerk of the peace out of sessions to be taken advantage of: *Regina v. Shrewsbury & Hereford R.W. Co.* (1855), 25 L.T. 65; *Freeman v. Read*, 9 C.B.N.S. 301; *Southampton Gaslight & Coke Co. v. Southampton Guardians* (1877), 2 Q.B.D. 371. Consent was implied, from silence, by the Divisional Court in *Midland R.W. Co. v. Edmonton Union* (1893), 70 L.T.N.S. 355.

But in *Midland R.W. Co. v. Guardians of Edmonton Union*, [1895] 1 Q.B. 357, Lord Halsbury repudiated this doctrine, and held that express consent was necessary. In the same case, however, in the House of Lords, [1895] A.C. 485, Lord Herschell said, at p. 488: "In consequence of some observations made in the Court of Appeal, I think it right to say that the practice to tax out of sessions has become, I believe, so common that the slightest evidence of consent would induce me to hold that consent had been given."

In this country appeals from summary convictions, with the costs of such appeals, are provided for by the Criminal Code in secs. 879 to 900 inclusive, and in these sections a distinction is drawn between the court and the sittings of the court.

By sec. 880a: "If the conviction or order is made more than fourteen days before the sittings of the court to

which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order is made within fourteen days of the sittings of such court, then to the second sittings next after such conviction or order."

By sec. 884: "The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same . . . though such appeal was not afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law at the *same sittings* for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court to be paid by the party or parties giving such notice.

Under this section the costs would have to be taxed and included in the order of the court during the sittings of the Court, unless taxed out of sessions by consent, and the amount afterwards filled in the order.

But in sec. 880 (e) and (f) there is no such restriction of the power of the court to the same sittings of the court for which notice of appeal has been given.

880 (e): "The Court to which such appeal is made," that is, the court named in sec. 879—in this case the Court of General Sessions of the Peace—"shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs, to either party, including costs of the court below, as seems meet to the court, and in case of the dismissal of an appeal by the defendant and the affirmance of the condition or order, shall order and adjudge the appellant to be punished according to the conviction, or to pay the amount adjudged by the said order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the

court; and whenever after any such deposit has been made as aforesaid the conviction or order is affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever after any such deposit the conviction or order is quashed, the court shall order the money to be repaid to the appellant."

(f) "The said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another or others of the said court."

There being no such restriction, and the Court of General Sessions of the Peace being a continuing court, as determined by *Keen v. The Queen* (1847), 10 Q.B. 928; *Campbell v. The Queen* (1846), 11 Q.B. 799; *The King v. Justices of Wilts* (1811), 13 East 352; *The King v. The Inhabitants of Kimbolton* (1837), 6 A. & E. 603; *The Queen v. The Justices of Westmoreland* (1868), L.R. 3 Q.B. 457, and *Midland Railway Co. v. Edmonton Union* (1893), 70 L.T.N.S. 355, I see no good reason why at the next sittings of the Court of General Sessions of the Peace for the county of Kent the formal order should not be drawn up and made in pursuance of the said minute, and the costs included therein *nunc pro tunc* if necessary.

Besides being a continuing court, the Court of General Sessions of the Peace is always presided over by the judge of the County Court, or in case of his death or absence by the junior or acting judge or deputy judge, who when sitting in court is in truth the Court of General Sessions of the Peace, as it is not requisite that an associate or other justice of the peace should be present, and therefore

the same reason does not exist for the restriction referred to as indicated by Lord Halsbury.

And in this case the learned judge of the County Court sat alone in disposing of the appeal.

There will be no costs.

*Rule nisi discharged.*

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

THE KING v. NELSON.

*Obstructing a peace officer—"Summary conviction" or "summary trial" procedure—Consent of accused—Jurisdiction of magistrate—Cr. Code, secs. 144, 783 (e), 784 (3), 785 (3).*

1. The provisions of Cr. Code 144 fixing the punishment for which any one guilty of obstructing a police officer shall be liable "on summary conviction" is not controlled by Code sections 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused.

*The Queen v. Crossen*, 3 Can. Cr. Cas. 158 (Man.), disapproved.

DECIDED: June 8, 1901.

Application for certiorari to remove into the Supreme Court a conviction of Richard Nelson who was convicted by the Police Magistrate of the City of Victoria for obstructing a peace officer in the execution of his duty. An affidavit of A. L. Belyea, counsel for Nelson, was filed, in which it was sworn that at the opening of the case the magistrate said he would dispose of it summarily under the provisions of the Summary Convictions Act, and that the magistrate did not proceed as directed by section 786 of the Code, and that the said Nelson was tried and convicted without his the said Nelson's consent. Affidavits

of the magistrate and the Chief of Police were filed to the effect that the magistrate informed Nelson's counsel, that as the case might be disposed of either under the summary convictions clauses of the Code, or under the clauses relating to the summary trial of indictable offences, it was unnecessary for him to state under which part of the Code he was proceeding, and he declined to limit himself to either part, saying, however, that he would dispose of it summarily (meaning, according to the magistrate's affidavit, as distinguished from a preliminary hearing).

*Belyea*, K.C., for the applicant.

*Maclean*, D.A.G., for the magistrate.

VICTORIA, B.C., June 8, 1901.

DRAKE, J.—

This application is for a rule absolute for certiorari to quash a conviction of the Police Magistrate of Victoria on the ground of want of jurisdiction to convict, the accused not having consented to be tried summarily.

The offence charged is for wilfully obstructing a peace officer in the execution of his duty. This is an offence under section 144, sub-section 2. That section enacts that "Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of \$100, who resists or wilfully obstructs any peace officer in the execution of his duty."

Then section 783 enacts that "whenever any person is charged before a magistrate with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, the magis-

trate may, subject to the provisions thereafter made, hear and determine the charge in a summary way. The jurisdiction of the magistrate in British Columbia is absolute without the consent of the person charged, sub-section 3, of section 784 as amended by ch. 46, 1900 ; but that amendment has an exception with respect to cases coming under section 785.

Section 785 is made applicable by the above amending Acts to all police and stipendiary magistrates of cities and incorporated towns in Canada, and is in effect as follows: "If any person is charged with an offence for which he can be tried at the Court of General Quarter Sessions, then such person with his own consent may be tried before such magistrates as are mentioned in section 782." We have no Court of General Quarter Sessions here, but we have the Supreme Court which has all the powers of the Court of General Quarter Sessions ; and the latter court, by section 539, can try certain indictable offences ; but by sub-section 3, of section 785, offences which come under sections 787 and 788 are not triable under section 785 ; and the offence here charged is punishable under section 788. I have referred to this section 785 because Mr. Belyea contended that the effect of it was in fact to give the accused the right of consent. It does not do so, it deals with the offences triable at quarter sessions, excepting those offences which are dealt with by sections 787 and 788. He further argued that this offence was only triable under Part LV. of the Code, which is headed Summary Trial of Indictable Offences, and was not triable under Part LVIII. which is called Summary Convictions. These two jurisdictions are quite distinct, and section 144 gives the magistrates a summary jurisdiction and limits the penalty to six months' imprisonment or \$100 fine. When the accused is tried under Part LV. the punishment is different, and he can be both imprisoned and fined.

Mr. Belyea relied on *The Queen v. Crossen* (1899), 3 Can. Crim. Cas. 153, where the Appeal Court of Manitoba held in a similar case that the accused could only be tried under section 786 notwithstanding the provisions of section 144. No reasons are given for this judgment, and although the Court giving this judgment is entitled to the greatest respect, yet until I have some reasons given for the views there adopted, I hesitate to follow it. To do so would be to ignore the language of section 144, to which, in my opinion, full effect can be given. Thus the accused can be tried summarily by the magistrate under the summary conviction clauses of the Code, or he can be tried before a magistrate as for an indictable offence. It is to be noted that sub-section (e) of section 783 includes in the definition of the offence other charges than that of resisting or wilfully obstructing a peace officer.

Mr. Belyea contended further that a magistrate was bound to inform the accused of the exact sections of the Code under which the proceedings were taken. It happens that the evidence sometimes will sustain a charge under one section and not under another. If the information is laid under a particular section then the offence under that section has to be proved ; but when it deals with an offence which may fall under one or more sections, or under the common law, then the conviction has to be looked to.

I think the rule should be refused, but I give no costs.

*Certiorari refused.*

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## [SUPREME COURT OF PRINCE EDWARD ISLAND.]

BEFORE SULLIVAN, C.J., HODGSON AND FITZGERALD, JJ.

## RE BARRON.

*Summary conviction—Magistrate's summons—Substitutional service at defendant's residence—Proof that person served was an "inmate"—Proof of efforts to effect personal service—Jurisdiction of magistrate—Supplementary evidence on certiorari—Cr. Code, secs. 562 (2), 843.*

1. The proof of service of a magistrate's summons served substitutionally must shew that the defendant could not be conveniently served in person, and that the adult person substitutionally served for him at the defendant's place of abode is an inmate thereof.
2. Where proof of the substitutional service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on certiorari.
3. Evidence will not be received in the certiorari proceedings to supplement the proof of service given before the magistrate.

DECIDED: January 25, 1897.

Application by way of certiorari on behalf of one Barron to quash a conviction made against him by Stipendiary Magistrate Hagyard under the provisions of the Canada Temperance Act, on the ground of insufficient proof of service.

The evidence before the magistrate was that a copy of the summons was left with an adult person at the defendant's residence. There was no proof before the magistrate that this adult person was an inmate of the defendant's last or usual place of abode, or that any effort had been made to serve the defendant personally with a copy of the summons.

*D. C. McLeod, and J. J. Johnston, for the applicant.*  
*H. James Palmer, contra.*



CHARLOTTETOWN, P.E.I., January 25, 1897.

THE COURT held that the service was insufficient, and refused to admit evidence to supplement the evidence given before the magistrate as to the service.

**Note:** *Summary proceedings—Substitutional service of summons—Crim. Code sec. 843.*

The magistrate acquires no jurisdiction over the person of the defendant while he is out of the province, and a conviction made on service of the summons upon his wife at his last place of abode in the province will be removed by certiorari and quashed on an affidavit made by the defendant that from a date prior to the laying of the information until after the hearing he had been continuously out of the province. *Ex parte Donovan*, 3 Can. Cr. Cas. 286 (N.B.); *Ex parte Fleming*, 14 C.L.T. 106; *Ex parte Simpson* (N.B.), 37 Can. Law Jour. 510.

Where substitutional service is relied on, there must be proof that the person served for the defendant was an inmate of the defendant's last or most usual place of abode, and that such person was apparently of the age of sixteen years or upwards, and service on a hotel clerk at the hotel of which the defendant was the proprietor and in which the proprietor usually resided was held insufficient without proof that the hotel clerk made the hotel his place of residence. *Ex parte Wallace*, 19 C.L.T. 406. But service on a person proved to be of the required age and to be employed at the defendant's residence as a domestic servant would seem to be sufficient. *R. v. Chandler*, 14 East 267.

If the summons is not served personally the nature of it must be explained to the person with whom it is left. *R. v. Smith*, L.R. 10 Q.B. 604.

It must also be shewn by affidavit or oral testimony that the defendant could not be conveniently met with, so as to effect personal service. *R. v. Carrigan*, 17 C.L.T. 224.

The jurisdiction of the magistrate is restricted to "the case" (Code sec. 853) that is, the charge as laid in the information on which the summons was issued, and it does not include a substantially new charge afterwards substituted by an amendment made in the absence of the accused. *Ex parte Doherty*, 1 Can. Cr. Cas. 84 (N.B.).

And where a summary conviction has been removed by certiorari together with the information and proceedings thereon and the conviction is quashed, the information becomes part of the record in the court above and cannot be returned to the magistrate for the purpose of a second summons thereon, although the conviction was quashed on the ground that the defendant had not been legally served. *R. v. Zickrick*, 11 Man. R. 452.

[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU AND SCOTT, JJ.

## THE QUEEN v. SKELTON.

*Perjury—False statutory declaration—Form of indictment—Charging intent to mislead—Declaration by several declarants—Joint preliminary enquiry—Persons “authorized by law” to declare—Crim. Code, secs. 147, 611, 641, 982—Code, Form FF.*

1. The examples in Code Form FF, of the description of offences in indictments are intended to illustrate the provisions of Code, sec. 611, relating to the form of counts; and the operative effect of Form FF, under Code, sec. 982, is not restricted to the validating of counts in respect only of the particular offences for which examples are given in the Form, but extends to counts for other offences.
2. On a charge under Code, sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead.
3. An indictment may be valid as being founded on the evidence disclosed on “the depositions taken before the justice” (Code, sec. 641), although the preliminary enquiry was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were given in respect of all of them in the one proceeding.
4. The permission granted by the Canada Evidence Act to certain officials to “receive” the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person “authorized by law to make a solemn declaration” (Code, sec. 147).
5. A statutory declaration jointly made by several persons and stating the matter declared in the following form, i.e. :—“We know that, etc.” is to be construed as a statement by each of the declarants severally, that he knows the matters alleged.

ARGUED: December 9, 1897.

DECIDED: February 11, 1898.

Case reserved by Wetmore, J., under the provisions of section 743 of the Criminal Code.

The defendant was charged before him at Battleford on the 28th of October last, as follows :—“James Moore Skelton of the town of Battleford, in the judicial district of Saskatchewan, in said territories stands charged :—

“ For that the said James Moore Skelton, at Battleford, aforesaid, on or about Friday the sixteenth day of April, A.D. 1897, in a certain solemn declaration made voluntarily before one John Cotton, one of Her Majesty's Justices of the peace in and for the North-West Territories, did falsely, wilfully and corruptly declare and state of John Byron Mercer, of Battleford, aforesaid, to the effect and in the words following, that is to say, ‘ we,’ meaning the said James Moore Skelton, and others ‘ know that he,’ meaning the said John Byron Mercer, ‘ kept in the Conservative Committee rooms the Battleford list of voters that had been made out and posted by the enumerator. This we believe was done to allow the Conservative committee to examine and revise such lists and also to prevent their being always open to the public as provided by law, and that by such action injury was done to the Liberal candidate ’ [he, the said James Moore Skelton, being then duly authorized by law to make any statements on solemn declaration, (sec. 147)].”

This charge as originally preferred on 28th October contained the word “ to ” which is italicized and did not contain the words which are within the brackets. Upon the defendant being arraigned upon this charge as originally preferred, and before he pleaded thereto, an application was made upon his behalf to quash it upon the following grounds :—

1. Because it did not allege in ‘ the language of section 147 of the Criminal Code that the statement set out in such paragraph was one authorized or required by law to be made on solemn declaration.

2. Because it did not allege that said statement was made with intent to mislead.

3. That the offence set out in the charge was not founded upon the facts or evidence disclosed in the deposi-

tions taken at the preliminary examination, and that the charge was not preferred by the Attorney-General or any one by his direction, or by any one with the written consent of a judge of any court of original jurisdiction or by the Attorney-General.

4. That the preliminary inquiry was held against three persons including the defendant and not against the defendant alone.

It was claimed on behalf of the Crown that the charge was laid under section 147 of the Code, and that in so far as the objections raised by the defendant were concerned the charge was good in law, but that if the trial judge should hold that any of the objections were well taken, leave should be given to amend. The application to amend was made in a general way without specifying what particular amendment was required. Objection was made on behalf of the defendant to any amendments to the charge being made on the ground that the objections were to matters of substance and not to mere matters of form, and that the trial judge had no power to amend as to matters of substance. The trial judge refused to quash the charge, and stated that he would reserve all questions of law raised for the opinion of this court. He declined to amend the charge in view of the general nature of the application, stating that he was not prepared to draft a charge, that it was not his duty to do so, and if the Crown officers desired any amendments they should specify what amendments they desired. The defendant then pleaded "not guilty" to the charge as originally laid, and he was then given the option of being tried by a judge with the intervention of a jury, or by a judge in a summary way without the intervention of a jury. He thereupon elected to be tried by a judge with the intervention of a jury, and the court

was then adjourned until the following day to enable a jury to be summoned.

Upon the opening of the court on the following morning application was made on behalf of the Crown to amend the charge by striking out the word "to," which is italicized above, and by inserting the words which are contained within the brackets. On behalf of the defendant it was objected that the proposed amendments did not cure the objections to the charge as originally laid. The trial judge allowed the proposed amendments to be made, and a plea of "not guilty" was entered by the defendant to the charge as so amended. The defendant by his Counsel then stated that he desired to withdraw his election made the previous day to be tried by a judge with the intervention of a jury of six, and to elect to be tried by a judge in a summary way and without the intervention of a jury, and he claimed that inasmuch as he had been called upon to plead *de novo* he had the right to so withdraw his election and make a new one.

The learned trial judge declined to allow the defendant to withdraw it and make a new one on the grounds that he had no right by law to elect to be tried by a judge in a summary way, that the matter of giving him his option to be so tried was entirely in the discretion of the judge, and that the charge as amended was substantially the same as that upon which he had made his election. The case was thereupon tried with the intervention of a jury.

The declaration which contained the alleged false statement was made under the Canada Evidence Act, 1893, by the defendant and three others and, in so far as the same is material to the question of law reserved, it is as follows:

"We, James M. Skelton, C. M. Daunais, Wilfrid Latour, Thomas Dewan, all of Battleford, Saskatchewan, do solemnly declare that we know of our personal knowledge

that " (here follows the alleged false statements and other statements).

At the preliminary hearing before the Justice of the Peace after the examination of the witnesses produced on the part of the prosecution had been completed, the defendant was addressed by the justices in the words following: " Having heard the evidence do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given against you at the trial." Whereupon the defendant made a statement, but before making it, he was at his own request sworn. The statement was taken down in writing and signed by the defendant and was offered in evidence by the Crown at the trial. It was objected to on the part of the defendant on the following grounds:

1. That it was the evidence of the defendant and not his statement taken in pursuance of the Criminal Code, 1892.

2. That it was not receivable in evidence by virtue of section 5 of the Canada Evidence Act, 1893.

The learned trial judge received the statement holding that it was none the less a statement under section 591 of the Criminal Code, 1892, because the defendant, at his own request, had been sworn before he made it, and, if it was not a statement made under that section, the defendant was a competent witness under section 4 of the Canada Evidence Act, 1893, and having offered his evidence under oath, and it having been received, it was not subject to the proviso contained in section 5 of the Canada Evidence Act, 1893, as the proceeding on which he was being tried was not instituted against him after such evidence was given but had been instituted against him when the information was laid, and was admissible under the general provisions

of the last mentioned Act and by virtue of section 592 of the Criminal Code, 1892.

At the close of the case for the Crown the objections raised to the charge on the application to quash were renewed on the part of the defendant for the reasons then urged. It was also urged on his behalf that perjury or any offence akin to it, could not be assigned on the solemn declaration put in evidence because the plural pronoun "we" was used. That in order to enable perjury or any offence akin thereto to be assigned on such a declaration the language should be "we jointly and severally know." That "we" is ambiguous and may include any two of the declarants and not necessarily the defendant.

The jury found the defendant guilty of the offence charged.

The questions of law raised for the opinion of this court are :

1. Were the objections raised to the charge on which the application was made to quash said charge or any of them good and valid objections in law, and ought the trial judge to have quashed the charge on said objections or any of them ?
2. Was he authorized by law to allow the charge to be amended in the manner it was so amended ?
3. Did the amendments cure the objections raised to the charge as originally laid or any of them ?
4. Was he justified in law in refusing to allow the defendant to withdraw his election to be tried with the intervention of a jury, and in refusing to try the defendant in a summary way without the intervention of a jury ?
5. In view of the objections taken to it, was the defendant's statement or evidence given before the justice at the preliminary examination properly received in evidence ?

6. Is it an indictable offence under section 147 of "the Criminal Code, 1892" to knowingly, wilfully and with the intent to mislead, make a false statement in a solemn declaration of the character of that in question in this case and made voluntarily under the circumstances under which the defendant made the declaration in question?

7. If not an offence under section 147 of the Code is it an offence under either sections 148, 149 or 150, and if so under which of these sections?

8. Was the objection taken on the ground that the personal pronoun "we" was used in the declaration a good and valid objection?

9. Was the learned trial judge correct in holding, as he did, that the offence charged was an indictable offence under section 147 of the Code and not under section 148, 149 or 150?

10. If the offence was not an indictable offence under section 147, was it an indictable offence under either sections 148, 149 or 150, and if so under which of those sections?

11. In view of the manner in which the charge is framed and if the offence is one under sections 148, 149 or 150, and not under section 147, can the verdict be treated as a verdict of guilty under either of those sections?

Section 147 of the Criminal Code provides as follows:—"Everyone is guilty of an indictable offence. . . . who being required or authorised by law to make any statement upon oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding."

*R. F. Chisholm*, for the Crown.

*T. C. Johnstone*, for defendant.



REGINA, N.W.T., February 11, 1898.

SCOTT, J.—

In order to ascertain whether a statement would amount to perjury if made in a judicial proceeding reference must be had to section 145 which defines that offence. It will there be found that one of the ingredients of the offence is that the statement must have been made with the intention to mislead. I think it is clear that, before the passing of the Code, where the intent with which an act was committed was a necessary ingredient of the offence, such intent must have been alleged in the indictment or charge, and there are some provisions of the Code which lend themselves to the view that it is still necessary to allege it, such as for instance section 613 which provides that in an indictment for an offence under section 361 it shall not be necessary to allege that the act was done with intent to defraud. The intent to defraud is not necessary to constitute an offence under the latter section, and, if it is unnecessary to allege the intent in cases where it is an ingredient, it seems unnecessary to provide that it need not be alleged in certain cases where it forms no part of the offence. Take also sub-section 1 of section 611 which provided that every count of an indictment "shall contain . . . . in substance a statement that the accused has committed some indictable offence therein specified." It might reasonably be contended that, where the law provides that an act shall be a criminal offence only in cases where it is done with a certain intent, an indictment alleging that the accused had done the act without alleging that it was done with that intent would not contain in substance a statement that the accused had committed an offence.

I am free to admit that these and other provisions of the Code led me to entertain the view that the charge in

question was defective by reason of the fact that it did not allege the intent to mislead. It contains no direct allegation to that effect, and I am of opinion that the figures "s. 147" at the end of the charge do not constitute a reference to any section of any statute within the meaning of sub-section 5 of section 611, but further consideration of other portions of the Code now leads me to the conclusion that the charge is not defective by reason of the omission referred to. Sub-section 4 of section 611 provides that the statement may be in any words sufficient to give the accused notice of the offence with which he is charged and Form FF in the schedule which expressly refers to section 611 gives examples of the manner of stating offences under it. Form C states an offence under section 359 for obtaining goods by false pretences. A reference to that section will shew that the intent to defraud is necessary to constitute that offence and yet Form C contains no allegation of such intent. If such an allegation is unnecessary in a charge under section 359, I fail to discover any reason why it should be considered necessary in a charge under section 147. I also fail to see that if the charge in question had contained such an allegation it would have given the defendant any further or better notice of the offence with which he was charged, than it now does without such allegation.

I have not overlooked the fact that Mr. Justice Taschereau in his work on the Code expresses the view that a count for false pretences is perhaps the only one that can be laid without an averment of the intent, where such intent is necessary to constitute the offence, but I do not agree with his view of the effect of Form FF in the schedule. To my mind they are intended to illustrate the provisions of section 611, and their effect was not intended to be confined, and is not confined, to the offences stated in them.

Section 982 provides that these forms varied to suit the case or forms to the like effect, shall be deemed sufficient. It is true as pointed out by Mr. Justice Taschereau, that the other forms in FF either directly or indirectly allege the intent, where the intent is necessary to constitute the offence, but it will be found that as to some of them at least, such allegation would be necessary in order to give the accused notice of the particular offence with which he is charged.

As to the third objection raised on behalf of the defendant upon his application to quash the charge. The information laid before the justice of the peace on the preliminary examination in this case, charged the defendant separately with "committing perjury, in that he made a false declaration before John Cotton, J.P.," and the portion of the declaration on which perjury was assigned, was set out in the information substantially just as it is in the charge in question, and such information stated that such declaration was signed by the defendant and Daunais Latour and. Dewan. Separate informations charging perjury in like manner were laid against Daunais and Dewan respectively, and one preliminary enquiry was held on such informations, against the three persons so charged. The evidence in the depositions taken at such preliminary examination disclosed sufficient to warrant the justice in committing the accused persons for trial for an indictable offence in declaring in such declaration to what was to them respectively, wilfully and corruptly false in the particulars charged against them in the informations, assuming that an indictable offence can be charged against a person in respect to a false statement so made in a solemn declaration made under section 26 of "the Canada Evidence Act 1893" under the circumstances under which the accused made the declaration in question.

Upon these facts as stated by the trial judge, I am of opinion that the charge in question was founded upon facts and evidence disclosed on the depositions taken before the justice on such preliminary examination, that such preliminary examination was sufficient for the purpose, and that the fact that it was held against three persons including the defendant is immaterial. Holding these views I am of opinion that the objections raised to the charge as amended, on which the application was made to quash it, are not, nor are any of them good and valid objections in law.

In answer to the second question submitted, I am of opinion that the trial judge had power to allow the charge to be amended in the manner it was amended. Irrespective of any question which may arise as to whether the amendment was as to a matter of form, or one of substance, I think that the Crown prosecutor, who was acting as Crown counsel at the trial, had the right under section 11 of the North-West Territories Act amendment (54-55 Vict., c. 22) to substitute another charge in respect to the same offence, and having that right, I see no reason why he should not amend the original charge instead of substituting a new one. Section 629 of the Code differs from the corresponding section of the Imperial Statute, inasmuch as the former is expressly confined to formal defects, and the reason given by the text writers for so confining it, is that there the grand jury are the accusers on the indictment, and the accusation cannot be changed into another one without their consent, and, if they have brought an accusation of an offence not known to the law, the court cannot turn it into an offence known to the law by adding to the indictment. That state of affairs does not exist here, because here the Crown prosecutor is the accuser, and in the present case he himself applied for the amendment.

As to the fourth question submitted I am of opinion that the trial judge was, for the reasons stated by him, justified in refusing to allow the defendant to withdraw his election to be tried with the intervention of a jury, and in refusing to try the case summarily without the intervention of a jury. *The Queen v. Brewster*, 2 N.W.T. Rep. 23, decided by this court is an authority upon that point.

As to the fifth question submitted, I am of opinion that the admission of the defendant's statement or evidence given before the justice on the preliminary examination was not open to the objections urged against such admission. I agree with the trial judge in the grounds stated by him for its admission.

As to the sixth question submitted I am of opinion that the act stated in the question is an indictable offence under section 147.

Upon the argument of the case, it was contended by counsel for the defendant that section 26 of "the Canada Evidence Act, 1893" merely authorized a justice of the peace, etc., to receive the solemn declaration of any person making the same before him as to the truth of any fact, etc., and did not go the length of authorizing such person to make such a declaration, that there is no other law which requires or authorizes a person to make a solemn declaration as to such matters as are contained in the declaration mentioned in this charge, and that as section 147 only applies to such statements on oath, affirmation or solemn declaration as a person is required or authorized to make, the matter contained in the charge is not an offence under that section. Section 150 of the Code was referred to as bearing out this contention because it applies only to declarations and statements which a person is permitted to make before an officer permitted to receive them, thus shewing that the permission to receive does not include

permission to make. I cannot find that it ever was the case that a person committed a criminal offence by taking an unauthorized oath, although the administering of such an oath did constitute an offence. The object of section 26 of the "Canada Evidence Act, 1893" and a somewhat similar provision in England (5 and 6 Will. 4, c. 62, s. 18) was to provide a means by which certain statements which were not authorized to be made on oath could be verified. This object was accomplished by permitting certain officers to receive solemn declarations as to such statements. If instead of doing this, Parliament had authorized the administering of oaths as to such statements, it would have removed the only restriction against the taking, as well as the administering of such oaths. I think therefore that the permission to receive a solemn declaration, includes authority to make it.

Section 150 does not refer to solemn declarations but merely to statements and declarations, the former are covered by section 147. It is only in certain cases that statements and declarations other than solemn declarations are specially authorized, and section 150 appears to be applicable only to such cases.

Section 147, it is true, applies only to oaths, affirmations and solemn declarations which a person is "required or authorized by law to make," but it must be remembered that these restricting words are necessary in the case of oaths or affirmations, and that in itself affords a sufficient reason for their insertion.

As to the eighth question submitted, I cannot find any authority directly bearing upon the point involved. In the absence of any authority to the contrary I see no reason why each one of the declarants should not be taken to have alleged his own personal knowledge of the matters set out in the declaration.

Owing to the views I have expressed it becomes unnecessary for me to refer to the other questions submitted. In my opinion the ruling of the trial judge should be confirmed.

ROULEAU, J., concurred.

RICHARDSON, J.—

The defendant was tried at Battleford on 26th October, 1897, before Mr. Justice Wetmore with the intervention of a jury and convicted, but sentence was deferred pending the consideration of this court of questions reserved by the learned trial judge. The material upon which the charge was preferred by the Crown prosecutor, was the making of a solemn declaration before a justice of the peace, of facts alleged therein which the prosecutor charged were false, which facts if made in a judicial proceeding would amount to perjury. The charge comprised four distinct counts, framed under sections 147, 148, 149 and 150 of the Criminal Code, but upon the ruling of the trial judge that the facts disclosed by the evidence would not support a conviction under either of the three latter sections, the jury rendered as to these a verdict of "not guilty," but as to the first count a verdict of "guilty" was rendered. It appears from the learned judge's reference that before pleading to the charge as laid by the Crown prosecutor, the defendant through his counsel, Mr. Johnstone, moved to quash it, alleging among other grounds as to the first count (1) that it did not allege in the language of section 147 of the Criminal Code that the statement set out in it was one authorized or required by law to be made on solemn declaration, (2) because it did not allege that the statement was made with intent to mislead. Objections were made at the same time to the other counts or para-

graphs of the charge, but as I endorse the ruling of the learned trial judge that neither of these counts are applicable to the circumstances, for the present I do not further allude to them.

The first count or paragraph alleges that the defendant in a certain solemn declaration made voluntarily before one John Cotton, a justice of the peace, did falsely, wilfully and corruptly declare and state of John Byron Mercer to the effect and in the words following: We etc., (setting out the facts alleged to be false). By the amendment allowed the following words were added [he the said James Moore Skelton being then duly authorized to make any statements on solemn declaration (s. 147)]. Now by section 147 "Every one is guilty of an indictable offence who being required or authorized by law to make any statement on solemn declaration thereupon makes a statement which would amount to perjury if made in a judicial proceeding." Dealing with the amendment made, the learned counsel for defendant urged before this court that the charge being bad in substance, was not amendable but should have been quashed. Bearing in mind that the amendment was allowed and made before the defendant had pleaded, as the defect, if it was a defect, was apparent on the face of the charge, in my opinion it was amendable under section 629.

Then as to the charge itself as it stands: Does it (sec. 611) contain in substance a statement that the accused Skelton had committed an indictable offence; (2) this statement may be made in popular language without technical averments or allegations of matter not essential to be proved; (3) such statement may be in the words of the enactment describing the offence or in any words sufficient to give the accused notice of the offence with which he is charged; (4) every count shall contain so much



detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act to be proved against him and to identify the transaction referred to, provided that the absence or insufficiency of such details shall not vitiate the count; (5) a count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

By the charge, to the accused is conveyed notice that he is charged with having on the 16th April, 1897, in a certain solemn declaration made voluntarily before John Cotton, a justice of the peace in and for the North-West Territories, falsely, wilfully and corruptly declared and stated of John Byron Mercer to the effect and in the words "set forth" he the said accused being then authorized by law to make any statement on solemn declaration (s. 147). The accused was bound to know or must be taken to know, whether or not had he made upon oath in a judicial proceeding a similar statement, falsely, wilfully and corruptly, it would amount to perjury, *i.e.* sec. 145, making an assertion on oath in a judicial proceeding which was known to him to be false, and being intended by him to mislead the court, etc. Having arrived at the opinion that the charge upon which the accused was tried is sufficient in law under the provisions of the Code, the learned trial judge submits the question:—

(6) Is a false statement in a solemn declaration of the character of that in question in this case, made knowingly, wilfully and with intent to mislead, voluntarily under the circumstances under which the defendant made the declaration in question, an indictable offence under section 147.

The evidence established clearly that the object in view of attainment by means of the false statement was to effect

or assist in obtaining Mercer's dismissal from an office he held, and mislead the person having the power to dismiss him. Section 26 of the Canada Evidence Act in my judgment authorizes the making of such a declaration as in this case, providing as it does that any . . . . . justice of the peace . . . . . may receive the solemn declaration of any person voluntarily making the same before him in the form prescribed . . . . . of the truth of any fact. And section 147 is intended to deal with those persons who availing themselves of the rights given by section 26 of the Canada Evidence Act, abuse them by making false statements of the kinds described. At the trial the learned judge admitted as evidence the accused's sworn statement given before the justices on the preliminary enquiry into the charge, after overruling accused's counsel's objections: (1) That the statement was the evidence of the defendant, and not his statement taken in pursuance of the Criminal Code. (2) That it was not receivable in evidence by virtue of the Canada Evidence Act, section 5. Now it appears, that when before the justice of the peace on the preliminary examination after the evidence for the prosecution had been concluded, the justice of the peace in addressing the accused, in so far as reported by him, omitted to include the latter portion of the form prescribed by section 591. He did inform him that he might say anything he wished in answer to the charge, but was not bound to say anything, but whatever he did say would be taken down in writing, and might be given in evidence against him on his trial. He was thus clearly cautioned, if not in the exact words, yet to the effect required by section 591. It then appears that the accused requested to be sworn, and being sworn by the justice of the peace, tendered in evidence the statement which the learned trial judge received in evidence voluntarily. There was no compulsion, and why what he then

stated voluntarily should be excluded, because it was reduced to writing and signed by him, I fail to observe. The proceeding in which the statement was made, was not a proceeding thereafter instituted against him it was in the then pending proceeding, consequently section 5 of the Evidence Act does not apply, and in my opinion accused's statement was admissible in evidence on the trial before the learned trial judge.

As to the 8th paragraph of the learned trial judge's reference, I fail to be convinced after hearing the arguments of the learned counsel for the defendant that by the use of the word "We" in the declaration in question "We know," etc., when both defendant and others have signed it, that it is open to ambiguity or that it is any other than the declaration of each of those who deliberately signed the same and solemnly declared to the facts contained in the document before the justice of the peace, and therefore I hold the learned trial judge was right in the view he took.

In the result, in my opinion the questions submitted for the consideration of this court by the learned trial judge must be answered thus :

One, two, five, six and nine in the affirmative.

Question three is not necessary to answer, such being covered by the answers to one and two.

Question four does not require a formal answer inasmuch as the objection raised was abandoned on the argument, the point having been decided in this court, *Reg. v. Brewster*, and a like objection overruled.

Questions seven, eight, ten and eleven in the view I take of the whole case require no direct answer.

In my opinion the rulings of the learned trial judge appealed from should be confirmed.

*Conviction affirmed.*

## [SUPREME COURT OF NEW BRUNSWICK.]

**Ex parte RYAN.**

*Disqualification of magistrate—Bias—Action by magistrate against defendant—Judgment signed but execution unsatisfied.*

1. The disqualification of a justice arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied.

An order nisi for a certiorari had been granted by His Honour Mr. Justice Landry, to remove a conviction of one Stephen Ryan, had before the Stipendiary Magistrate for the County of Westmorland, for selling intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The magistrate had recovered a judgment on a nonsuit for \$75 in the action referred to in *Ex parte Ryan*, 30 N.B.R. 256, on which an execution was issued which was not satisfied.

FREDERICTON, N.B., April 11, 1894.

*Jordan*, Q.C., shewed cause: Such a bias as would disqualify a magistrate could not be inferred from the mere existence of a judgment.

*Grant*, contra: It has already been decided in *Ex parte Ryan*, 30 N.B.R. 256 that the fact that an action is pending between the magistrate and the defendant disqualifies the magistrate. The judgment here has not been satisfied. [BARKER, J. A different rule obtains where judgment has been signed.]

FREDERICTON, N.B., April 11, 1894.

THE COURT discharged the rule nisi.

*Conviction affirmed.*

## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, BARKER  
AND VAN WART, JJ.

**Ex parte HANNAH GALLAGHER.**

*Disqualification of magistrate—Bias—Interest—Action of tort pending against magistrate at suit of husband of accused.*

1. A magistrate is disqualified from trying an information for an offence punishable on summary conviction where there is a bona fide action pending against him brought by the husband of the accused for alleged malicious conduct as a judicial officer and for assault.
2. If the action against the justice is not bona fide but a mere sham to attempt to disqualify him, its pendency will not operate as a disqualification.
3. The principles which govern the challenge of a juryman for favour are applicable to the disqualification of a justice on the ground of bias.

ARGUED: November 4, 1897.

DECIDED: February 5, 1898.

In Trinity Term, 1897, the Court granted rules nisi for certiorari to remove two convictions made against the applicant, Hannah Gallagher, by Walter Cahill, the Stipendiary Magistrate of the Parish of Sackville, in the County of Westmorland, for keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act on the ground that the magistrate was disqualified from trying the informations by reason of his being the defendant in an action at law brought and now pending against him by Patrick Gallagher, the husband of the applicant.

FREDERICTON, N.B., November 4, 1897.

*McCready* shewed cause: *Ex parte Ryan*, 30 N.B.R. 256, is distinguishable from this case. There the action was bona fide; in this case it is not.

*D. Grant* in support of the rules : It is submitted that bias need not be shewn. It is enough if the relationship of the parties is such that a prejudice may be inferred.

FREDERICTON, N.B., February 5, 1898.

HANINGTON, J.—

In these cases Hannah Gallagher, the wife of Patrick Gallagher, was convicted before Walter Cahill, Esquire, Stipendiary Magistrate, "for keeping for sale" liquor contrary to the provisions of the second part of the Canada Temperance Act. Some months previous to the laying of the informations and the hearings, the defendant's husband had commenced an action in the Supreme Court against Cahill for malicious conduct as a judicial officer and for assault, which action was pending at the time of the hearings and adjudications now complained of, and was then at issue to be tried. Her husband had also made a complaint to the Executive Government of the Province asking for the removal of Cahill from office. The question is, does the existence of that suit and petition to Government disqualify the magistrate from acting. I think that the pending of the suit alone places the magistrate in a position of bias against the husband and consequently against the wife. The husband is about as much interested in the prosecution as the wife, or more so. He would have to pay or submit to his wife's going to goal, and if any bias really did exist against the husband I think that it would derive as much satisfaction from the conviction of the wife as it would from the personal conviction of the husband. I do not mean to say that there was here any real bias, nor is it necessary that there should be, to disqualify the magistrate. It is enough if, from the circumstances, he might be biassed or influenced as was held in *Regina v. Milledge*,

4 Q.B.D. 332, and in *Regina v. Gaisford*, [1892] 1 Q.B.D. 383, where Mathew, J., says: "It was argued on his (the Justice's) behalf that it was incumbent on the plaintiff to shew that the Justice was in fact influenced, but in my opinion it is sufficient to shew, as was held in *Regina v. Milledge*, that he might have been influenced." The magistrate's position here would be a good ground of challenge to a juror for favour, and when a justice comes within the principles that govern in such challenges to a jurymen, he is held disqualified to act, as was held in *Ex parte Wallace*, 27 N.B.R. 174, and in *Ex parte Jones*, 27 N.B.R. 552. The fact of a suit bona fide pending (and I think this has been clearly made out by the affidavits) has been held to be a sufficient ground for a certiorari and to quash a conviction under the Canada Temperance Act in *Ex parte Ryan*, 30 N.B.R. 256, where a suit had been brought by the defendant against the Justice and constable for assault. In that case the Court evidently followed the case of *Regina v. Rose Mylne*, 4 P. & B. 394. In the Mylne case Mrs. Mylne was indicted for a felonious assault, and upon her trial the array was challenged on the ground that her husband had a suit then pending against the sheriff for trespass to land and assault on his wife. She was convicted, and on motion to quash the conviction on the ground of the challenge the Court sustained the motion and quashed the conviction. If that objection disqualified the sheriff from summoning a jury, by so much more would it, I think, disqualify a Judge. It was attempted to shew that the suit pending against the magistrate here was not bona fide. I think that is not made out. If it were made to appear that the bringing of a suit against the Justice was a mere sham to attempt to disqualify him, I should hold, as the Court held in *Ex parte Scribner*, 32 N.B.R. 175, that it did not work his disqualification; but it is otherwise here.

The facts in the Mylne case did not go far to prove its bona fides, for it was not proceeded with, but the Court would not closely scrutinize that. It seemed to be enough that it had been commenced and had not been discontinued.

I think that the magistrate here was disqualified and that the rules must be made absolute.

LANDRY, J.—

These two cases were heard before the Stipendiary Magistrate of Sackville, who convicted the applicant.

The point for decision is whether the convicting magistrate was disqualified by reason of his being the defendant in an action brought by the husband of G. and now pending in the County Court of Westmorland.

*Ex parte Scribner*, 32 N.B.R. 175, is authority for the proposition that a suit pending between the parties is not of itself a disqualification for the convicting magistrate, and when the Court has evidence to satisfy it of the want of good faith in the bringing of the action the conviction will not be disturbed.

In these two cases the evidence shews that the action was brought, issue joined, and at the request of the defendant (the convicting magistrate) notice of trial was not given for March, 1897; that notice of trial was given for June, 1897, and at the written request of the defendant (the magistrate), on the ground that his counsel was attending to his parliamentary duties at Ottawa, the plaintiff's counsel consented to the trial being postponed. The attorney of the plaintiff swore that the action was bona fide, and that it was the intention to prosecute it. Under these circumstances I am of the opinion that there being an honest intention to prosecute the pending suit between the defendant's husband and the convicting magistrate, the



latter was disqualified from hearing the cases and the rules should, therefore, be made absolute.

TUCK, C.J.:—

I agree with my brother LANDRY. The action was bona fide. It goes to the favour and is a disqualification.

BARKER AND VANWART, JJ., agreed.

*Rules absolute.*

**Note:** *Disqualification of magistrate—Interest or bias.*

See *Ex parte McCoy*, 1 Can. Cr. Cas. 410 (N.B.) and Note to same; *R. v. Herrell*, 1 Can. Cr. Cas. 510 (Man.); *R. v. Steele*, 2 Can. Cr. Cas. 433; *Ex parte Flannagan*, 2 Can. Cr. Cas. 513 (N.B.); *Ex parte Gorman*, 4 Can. Cr. Cas. 305 (N.B.).

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[SUPERIOR COURT FOR THE DISTRICT OF  
MONTREAL]

BEFORE DAVIDSON, J.

**ARCAND v. MONTREAL HARBOUR COMMISSIONERS.**

*Certiorari—Harbour commissioners—Conviction of pilot—Pilotage Act, R.S.C. c. 80, sec. 73—Crim. Code, sec. 879.*

1. The appeal to the Quebec Court of Queen's Bench, Crown Side, provided in Crim. Code sec. 879, does not apply to a conviction by the Harbour Commissioners, in their capacity of the pilotage authority, depriving a pilot of his license.
2. Such a conviction is subject, in the Province of Quebec, to proceedings by certiorari to the Superior Court on proof of due cause for evocation.

MONTREAL, September 24, 1897.

DAVIDSON, J.—

Arcand has been deprived of his license, as a pilot, by the respondents, who are the pilotage authority of this district.

A petition is now made to me for the issuance of a writ of certiorari, under which the sentence may be investigated and, if need be, quashed.

Under articles 1292, 1293 of the Code of Procedure, where no appeal is given from the courts of inferior jurisdiction mentioned in articles 59, 63, 64 and 65—among which are respondents—a case may be evoked before judgment, or the judgment may be revised, by means of a writ of certiorari, unless this remedy is also taken away by law.

The remedy lies, nevertheless, only in the following cases :

- (1) When there is want or excess of jurisdiction ;
- (2) When the regulations upon which a complaint is brought, or the judgment rendered, are null or of no effect;

(3) When the proceedings contain gross irregularities and there is reason to believe that justice has not been or will not be done.

It is asserted by the petition and annexed affidavit that on the 25th of June, 1897, respondents, by a judgment or conviction, deprived Arcand of his license as a pilot; that no requisition to take charge of a ship was lawfully made upon him, that he did not receive lawful service of the proceeding; that the summons does not disclose the penalties to which it might subject him; that respondents ought not to have united the qualities of prosecutors and judges; and that for all these reasons the conviction should be quashed.

How far these allegations are sustained by the actual facts can, of course, only be known if and when the records are ordered up before us under the requirements of the writ. They are sufficiently serious as matters of prima facie record, to justify its issue if such a remedy lies. This view does not, of course, in any way prejudice the merits of the case.

Resistance to the application is chiefly based on the ground that the case does not come within the limitations of C.P. 1292, for the reason that an appeal lies to the Court of Queen's Bench from the decision of the Harbour Commissioners. In support of this point I am referred to the Montreal Harbour Commissioners Act, 1894 (57-58 Vict., ch. 48). By section 44 the corporation is to continue to exercise jurisdiction in respect of, among other things, all matters arising from the provisions of The Pilotage Act. It further provides that certain sections of the Criminal Code, 1892, shall apply. Among these sections is 879 which enacts that unless it is otherwise provided in any special act under which "a conviction takes place or an order is made by a justice for the payment of

money," any person who thinks himself aggrieved by any such conviction or order may appeal, in the Province of Quebec, to the Court of Queen's Bench, Crown side. The word "conviction," as thus used, is not limited to one "for the payment of money." The clause covers two classes of sentences, one represented by "convictions" and the other by "orders for the payment of money." Subsequent sections make this quite clear. On the other hand I am convinced that the appeals provided by the 879th and following sections are of the summary kind and do not at all apply to such a sentence or order as is now sought to be brought before this court. To hold otherwise would entail, among other incidents, the re-making of all the evidence. In a matter of discipline such as is represented by the cancellation of a pilot's license, it was surely never intended that practically a new trial should be had of the whole case. What was intended and what was done, was to provide, when occasion arose, for an exercise of the superintending jurisdiction of this court. Let the writ issue returnable on the 4th of October next. Costs reserved.

The conviction, having been brought up on certiorari, was subsequently quashed by an order of LORANGER, J.

*Conviction quashed.*

*Angers, de Lorimier and Godin, for petitioner.*  
*Geoffrion, Dorion and Allan, for respondents.*

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## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J.

## The KING v. KEEPING.

*Disorderly house—Keeping a bawdy house—Summary trial—When consent required—Form of information under vagrancy clauses—Describing offences under Code, sec. 783—Conviction possibly including offence subsequent to information—Habeas corpus in Nova Scotia—Order of protection to jailer only—Cr. Code, secs. 198, 207 (j), 208, 783 (f), 785.*

1. An information charging the accused, for that she was "the keeper of a disorderly house, that is to say, a common bawdy house," must be taken to be a charge under Code, sec. 198, for the indictable offence of keeping a common bawdy house, and is not cognizable under the special jurisdiction given to magistrates by Code, sec. 783 (f), because not laid in the exact language of the latter section.
2. Such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under Code, sec. 785 (amendment of 1900).
3. To give jurisdiction to a justice to punish on summary conviction the keeper of a disorderly house under the vagrancy clauses of the Code (secs. 207 and 208), the information must charge that the accused is a loose, idle or disorderly person or vagrant (sec. 208), and it is not sufficient to charge simply that the person is a keeper of a disorderly house, although that fact constitutes the person a loose, idle or disorderly person or vagrant, by virtue of Code, sec. 207.
4. A conviction for that the accused was on April 21 "and on divers other days and times during the month of April" the keeper of a disorderly house, based upon an information in like terms laid on April 29, is bad, because it may be read as inclusive of an offence committed subsequently to the laying of the information, and including the date of the conviction, as to which the prisoner was not charged on her trial before the convicting magistrate.
5. In discharging a prisoner in habeas corpus proceedings under ch. 181, Revised Statutes of Nova Scotia, an order of protection in respect of a civil action by the prisoner, can be made only in favour of the jailer and not in favour of the magistrate and prosecutor.

ARGUED: June 4, 1901.

DECIDED: June 4, 1901.

Motion in Chambers, under ch. 181, Revised Statutes, 1900, on the return of a habeas corpus and a certiorari in aid thereto, for the discharge from custody of Mary Keeping, the defendant, a prisoner in the common jail at Hali-

fax, under a warrant of commitment reciting a conviction which is as follows:—

“ Be it remembered, that on the 30th day of April, in the year one thousand nine hundred and one, in the police court in the city of Halifax, Mary Keeping being charged before me, the undersigned stipendiary magistrate, and one of His Majesty’s justices of the peace in and for the said city of Halifax, for that she, the said Mary Keeping, in the said city of Halifax, on the 21st day of April, A.D. 1901, and on divers other days and times during the month of April, A.D. 1901, was the keeper of a disorderly house, that is to say, a common bawdy house at No. 18 Maitland Street, in the said city of Halifax, and being tried this day is convicted before me of the said offence. I find the costs of the prosecution to be four dollars, but I do not award costs.

“ And I adjudge the said Mary Keeping for her said offence to forfeit and pay a fine of fifty-four dollars, to be paid and applied according to law ; and if the said sum be not paid forthwith, I adjudge the said Mary Keeping to be imprisoned in the County jail, at the said city of Halifax, and there kept at hard labour for the term of four months, unless the said sum be sooner paid.

“ Given under my hand and seal, the day and year first above mentioned, at Halifax, aforesaid.

“ GEORGE H. FIELDING, (L.S.)

“ Stipendiary Magistrate in and for the City of Halifax.”

The information on which this conviction was based was laid before the stipendiary magistrate at Halifax on the 29th of April, 1901, charging in identical terms on that date the offence set out in the above conviction, and the prisoner having been brought before him on a warrant on the following day, was summarily tried on the information under Part LV. of the Code, after a plea of “ not

guilty," and without her consent being obtained to such trial, and convicted on the same day, and on that conviction was committed to jail as aforesaid.

HALIFAX, June 4, 1901.

*J. J. Power*, for the prisoner: The conviction was made without jurisdiction, as the defendant was charged with keeping a *common* bawdy house under sec. 198 of the Code, and tried without her consent, the punishment thereunder being commutable under sec. 958 of the Code (amendment of 1900). Section 198 is merely declaratory of the common law; sub-sec. 2 was taken from 25 Geo. II. (Imp.), ch. 36, sec. 8. It is not repealed, either by sec. 207 (*j*), or 783 (*f*), of the Code; Maxwell on Statutes (last edition), p. 256. Before the stipendiary magistrate tried the prisoner he should have obtained her consent, Code secs. 785, 539, 540, and that consent should appear on the face of the proceedings, *R. v. Hogarth*, 24 Ont. R. 60; *R. v. Cockshott*, [1898] 1 Q.B. 582. This offence is also dealt with under Code 207 (*j*).

[WEATHERBE, J.—In my opinion sec. 207 (*j*), creates no such offence; it only indicates one of the class of offenders named in the opening words of the section itself. To my mind there is no doubt on that point].

We next come to 783 (*f*), but the offences there mentioned are "a disorderly house" and "a bawdy house," and the punishment there is less than under 198. No consent is necessary when trying a prisoner under 783 (*f*). The conviction is also bad, as it might be for an offence committed on a date after the information was laid. *Ex parte Kennedy*, 27 N.B.R. 493.

*H. S. Blackadar*, for the Attorney-General of Nova Scotia, contra: The term "disorderly house" in 783 (*f*),

is the same as a "disorderly house" in sec. 198, *Ex parte Cooke*, 3 Can. Cr. Cas. 72. The jurisdiction conferred by 783 (*f*), refers to the keeping of common bawdy houses, mentioned in secs. 195 and 198 of the Code, *The Queen v. Bougie*, 3 Can. Cr. Cas. 487. As to the other point, the conviction clearly refers to the information, and the charge here covers a specific period.

*J. J. Power*, in reply, referred to *The Queen v. France*, 1 Can. Cr. Cas. 321; *Re Moore*, 33 C.L.J. 400.

HALIFAX, June 4, 1901.

WEATHERBE, J.—

I am of opinion the prisoner must be discharged from custody on both the grounds urged on her behalf. She was clearly notified that she was charged with the indictable offence, provided for in sec. 198 of the Code, and while the magistrate could hold a preliminary examination and commit her for trial, if he thought fit to do so, he could not try her without her consent, as provided for in sec. 785 of the Code, as recently amended: (1900, 63 Vict. (Can.), ch. 46). The conviction on that ground is, therefore, absolutely without jurisdiction. 207 (*j*) of the Code does not help the matter, as that sub-section creates no offence, but only indicates one of the many ways how a person may be a "loose, idle or disorderly person, or a vagrant," and that is the proper way to charge an offence under that section.

I am also of an opinion that this matter is not covered by sec. 783 (*f*) of the Code; that refers to distinct offences mentioned there, and which are not necessarily the same as those mentioned in sec. 198. At all events, this person was not charged under 783 (*f*).



As to the other point, I think that the conviction might be understood as covering an offence committed up to the 30th. She was not tried for that, yet she is convicted for it. I quite agree with the New Brunswick authority cited on the argument.

In ordering her discharge I will protect from the consequences of any civil action arising out of the prisoner's detention every person whom I lawfully can under the statute. I suppose I might discharge the prisoner and hear this point argued afterwards. I agree with Mr. Justice Ritchie's views in the *Moore case*, but at present, in view of Mr. Power's statement that no action will be brought, it might be stated in the order that the prisoner consents to bring no action, but it can also be stated that I refrained from imposing any such term upon her, except in relation to the jailer.

*Order for discharge.*

**Note :** *Bawdy house cases*—Keeper, inmate or frequenter—Cr. Code, secs. 198, 207, 208, 783.

Sec. 783 of the Code is one relating to procedure only, and has reference to various offences, the illegality of which is declared by other sections of the Code. Its object is to provide a summary method of disposing of certain classes of offences for which, in the interests of justice, the utmost expedition is required in bringing them to trial, and which were thought not to be of too serious a nature to entrust to the judgment of the selected officials designated by Code sec. 782, when hedged about with the limitations of section 786 *et seq.*

By sec. 198, every one is guilty of an indictable offence and liable to one year's imprisonment who keeps "any disorderly house, that is to say, any common bawdy-house, common gaming house or common betting house," as the latter terms are defined by secs. 195 to 197 inclusive. Secs. 195 to 198 inclusive deal with the keeping of a bawdy-house as constituting a public nuisance. *The Queen v. Bougie*, 3 Can. Cr. Cas. 487. The keeping is a nuisance at common law, on the ground both of its corrupting public morals and of its endangering the public peace by reason of dissolute persons resorting thereto. 1 Russell on Crimes, 5th ed., 427; Hawkins Pleas of the Crown, b. 1, c. 74, s. 1.

**Note—Continued.**

The vagrancy clauses of the Code (secs. 207 and 208), also deal with this offence by declaring that a keeper of a bawdy-house is a vagrant and may be punished on summary conviction. (Sec. 208 as amended by 57-58 Vic., c. 57 and 63-64 Vic., c. 46.)

Vagrancy is not an indictable offence, but loose and idle persons were liable at common law to be apprehended and bound over for their good behaviour, and were liable to summary proceedings before justices of the peace under various early statutes in England. Crankshaw's *Crim. Code*, 2nd ed., p. 210. Then under the Code, and under the Revised Act respecting Public Morals, R.S.C. 1886, c. 157 (s. 8), from which the vagrancy clauses are derived, "inmates" as well as "keepers" were made subject to summary prosecution as vagrants, and likewise any person who is an habitual frequenter of a bawdy-house and who, on being asked by a peace officer to give an account of himself or herself when found there, fails to give a satisfactory account. *R. v. Levesque*, 30 U.C.Q.B. 509; *R. v. Clark*, 2 Ont. R. 523; *R. v. Arscott*, 9 Ont. R. 541; *Arscott v. Lilley*, 11 Ont. R. 153.

Now, although secs. 782 and 783 appear under the general heading given to Part LV., i.e. "Summary trial of indictable offences," the inclusion therein of the offences of being an inmate of a bawdy-house or being an habitual frequenter of same, must be taken as referring to the vagrancy clauses, secs. 207 and 208, and as providing an alternative procedure for the enforcement of those sections as well under the "summary trials" procedure, Part LV., as under the procedure by "summary convictions by justices" (Part LVIII.), as there are no other sections of the Code dealing with "inmates" and "frequenters."

The alternative procedure under the "summary trials" clauses was of more practical importance before the year 1894, as prior to the amendment then made to sec. 208, a summary conviction for vagrancy could only be made by two justices or an official having the power or authority of two justices. By the statutes of that year (57-58 Vic. c. 57) the words "before two justices of the peace," which followed the words "on summary conviction" were struck out; and the effect of the alteration was to give jurisdiction to one justice of the peace. Code sec. 842 (2).

It is submitted that the judicial officers empowered by sec. 782 to hold summary trials are given absolute jurisdiction to summarily try the offences of being an inmate or habitual frequenter of a bawdy-house (sec. 784), whether or not such officers are constituted justices of the peace under their Provincial laws, and that the penalty for such offenders is limited to that imposed by sec. 208. The contrary has, however, been held by Ritchie, J., of the Supreme Court of Nova Scotia, in *The King v. Roberts* (1901), reported *ante* p. 253.

**Note—Continued.**

Where, however, the "keeper" is charged, the punishment may be, (a) on summary conviction before a justice, fine of \$50 or six months' imprisonment, or both; (b) on summary trial under sec. 783, fine \$100 or six months' imprisonment, or both (Code sec. 788); (c) on trial under indictment, one year's imprisonment (Code sec. 198) or a fine in discretion, or both (Code sec. 958 as amended in 1900).

There does not seem to be any real distinction between a "bawdy-house" and a "common bawdy-house" as those terms are used in the Code. The definition of a "common bawdy-house" under sec. 195 is "a house, room, set of rooms or place of any kind kept for purposes of prostitution." This would appear to include anything which, without the word "common," could be termed a "bawdy-house." With all deference, it is submitted that the information and conviction in *Keeping's Case*, *supra*, were perfectly regular in so far as they charged the defendant with being "the keeper of a disorderly house, that is to say a common bawdy-house." The fine was for more than \$50, and was in excess of the punishment authorized by the vagrancy clauses, but was authorized under secs. 783 and 788, when the judicial officer had the power to hold a "summary trial."

See also *R. v. Spooner*, *ante* p. 209.

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[SUPERIOR COURT FOR THE DISTRICT OF  
MONTREAL]

BEFORE DAVIDSON, J.

**PERRAULT v. MONTREAL HARBOUR COMMISSIONERS.**

*Certiorari—Conviction by Harbour Commissioners—Pilotalge regulation—By-law as to rotation—Proof of by-law—Irregularity appearing of record—Waiver by pleading—Pilotalge Act, R.S.C. ch. 80.*

1. A writ of certiorari may issue from a conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law.
2. A pilot, by appearing, pleading, and attending the investigation of a complaint against him, is held to waive irregularities of service, etc., before conviction, which appear on the face of the record.
3. A copy of by-laws of the Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, *semble*, proof should also be made of approval by the Governor-in-Council and of publication in the *Canada Gazette*.
4. Under the Pilotalge Act, R.S.C. ch. 80, and the Montreal Harbour Commissioners' Act, 1894, 57 Vict., ch. 48, the Montreal Harbour Commissioners are authorized to pass a by-law which will make it an offence for a pilot, who is selected for service with one transatlantic line, to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line; but the by-law in question in the present case merely stating that "no pilot making such agreement shall . . . be entitled to any duty as pilot by turn or in rotation," did not actually prohibit the act mentioned.
5. The conviction in this case, as signed, was irregular, inasmuch as it imposed an imprisonment of one month unless the costs of distress and commitment were sooner paid, whereas by the judgment of the pilotalge committee the only penalty imposed on the petitioner was that he be fined \$20 without costs.

DECIDED: December 19, 1898.

The case came up on a certiorari from a conviction of a pilot by the Montreal Harbour Commissioners. The case, as to the merits, turned mainly upon the effect to be given to by-law No. 109, passed by the Commissioners, which reads as follows:—

109. "Any pilot may, subject to the Commissioners' approval, agree with the agent of not more than one

transatlantic line for special service for a season of navigation on any vessels of such line, for not exceeding thirty trips between Montreal and Quebec, either up or down, or with the agent of any gulf port line for similar service on any vessels of such line for not more than the proportionate number of trips which would fall to such pilot if such line employed one pilot for each two vessels.

"No pilot making such agreement shall, during the season of navigation to which the same is intended to apply, be entitled to any duty as pilot by turn or in rotation."

MONTREAL, December 19, 1898.

DAVIDSON, J.—

In obedience to a writ of certiorari issued out of this Court respondents have certified and returned the record of a conviction dated 6th July, 1898, whereby petitioner has been condemned to a penalty of \$20, and in default of payment to one month's imprisonment, for having violated by-law 109, "by piloting from Quebec to Montreal the steamship Carlisle City, of the Furness line, while being under special engagement with the agent of the Hamburg-American Packet Company."

Petitioner claims that the conviction is irregular, illegal and *ultra vires*, and that it ought to be quashed.

Respondents appear by counsel to contest any right of appeal by certiorari, and, if it lies, to sustain the regularity and lawfulness of their conviction. I have already decided in the *Arcand case*, 17 Que. S.C. 497 [4 Can. Cr. Cas. 491], that the writ of certiorari may issue in matters of this kind. It was also so held in *Dussault v. The Harbour Commissioners*, 12 Que. S.C. 417. The questions which

call for decision make it necessary to state in detail the incidents and procedure which led up to the conviction.

On the 15th of June last, Joseph Pleau, a licensed pilot, addressed a letter to respondents, in the course of which he stated that on the 9th of June, petitioner, a pilot engaged on the Hamburg-American Packet Company line, had monopolized the pilotage of the steamship Carlisle City, belonging to another line; that petitioner was requested by the agent of the *tour de rôle* pilots at Quebec, and by two pilots of that *rôle*, to comply with by-law 109; that, notwithstanding, he transgressed the by-law and piloted the vessel at his risk and peril. The letter proceeded to request, in the name of the writer and of the *tour de rôle* pilots: First, that an enquiry be held into the conduct of the petitioner; second, that the money coming from the pilotage of the Carlisle City be remitted to the pilots of the *tour de rôle*; third, that petitioner be punished according to law for violating the by-laws of the Harbour Commission of Montreal.

The powers of respondents to deal with a complaint of this character are contained in The Pilotage Act, R.S.C. ch. 80, and The Montreal Harbour Commissioners Act, 1894, 57-58 Vict., ch. 48.

By sec. 17 of the latter act, " . . . the powers of the corporation as pilotage authority, and its judicial powers, may be delegated to any three commissioners and may be exercised by them, although the corporation is acting in other matters." This delegation of pilotage authority and judicial powers has been made to a pilotage committee. It appears by the minutes of the respondents' weekly meeting held on the 15th of June that Pleau's complaint was referred to "the Commissioners' Pilotage Committee to deal with in their discretion, the powers of the

corporation as pilotage authority being duly delegated to said committee for the purpose."

A copy of the complaint was forwarded to the petitioner and he replied: " . . . in answer to Mr. Pleau's communication of the 15th of June instant, that it was upon the special request of W. M. McPherson, Esq., agent for the Dominion steamship line, and others, to whom as pilot I am engaged for the season, that I took charge of the steamship Carlisle City from Quebec to Montreal. I had no discretion to exercise in the matter. Being requested to take charge of the vessel I had to obey or violate the law and submit myself to penalties.

"I did not seek for the pilotage of the Carlisle City; it was forced upon me by Mr. McPherson, to whom I am engaged for the season. Please lay before your board the above answer. I file with the same the telegram I received in the premises from Mr. McPherson."

The telegram referred to was addressed to petitioner at Deschambault and read as follows:—

"Come down to-morrow afternoon for Carlisle City."

On the 29th of June the pilotage committee met. Petitioner appeared and pleaded not guilty. He gave his evidence under oath. So, too, did a number of witnesses. The committee adjourned to the 4th July, when several letters, telegrams, and reports were presented and filed.

On the 6th of July the committee reviewed the evidence and gave the following judgment:—"After full deliberation it was resolved, on the vote of Messrs. Racine and Lemay, that the pilot be fined \$20, without costs, Mr. Bickerdike dissenting therefrom. The counsel were asked to draw up a formal judgment in the case to be signed by Messrs. Allan, Racine and Lemay." Mr. Allan's name is, apparently, by a clerical error, omitted from the resolution. The conviction as signed is in these terms:—

"CANADA.

" Pilotage District of Montreal.

"THE HARBOUR COMMISSIONERS OF MONTREAL.

"In *re* enquiry Edouard Perrault.

" Be it remembered that on the 6th day of July, in the year 1898, at the city of Montreal, after hearing the evidence in the case, the parties being present or represented, the said Edouard Perrault is convicted before the undersigned, being members of the Pilotage Committee of the Harbour Commissioners of Montreal, to whom the jurisdiction and authority of the said Harbour Commissioners was duly delegated as allowed by law, for that the said Edouard Perrault did, on or about the 9th day of June, 1898, violate by-law 109 of the said Harbour Commissioners by piloting from Quebec to Montreal the steamship Carlisle City, of the Furness line, while being under special engagement with the agent of the Hamburg-American Packet Company, and we adjudge the said Edouard Perrault for his said offence to forfeit and pay the sum of \$20, to be paid and applied according to law, and if the said sum be not paid on or before the 1st day of August next, we order that the same be levied by distress and sale of the goods and chattels of the said Edouard Perrault, and in default of sufficient distress, we adjudge the said Edouard Perrault to be imprisoned in the common gaol of the said city of Montreal for the term of one month, unless the said sum and all costs of the said distress and of the committance of Edouard Perrault to the said gaol are sooner paid.

" Given under our hands and seals the day and year first mentioned above, at the city of Montreal.

(Signed),

ANDREW ALLAN,  
ALPHONSE RACINE,  
E. H. LEMAY."



Ships belonging to the Furness line and two of the American Packet Company were run to this port last summer. They were advertised together, and had the same agents at Montreal and Quebec. The agents selected pilots George Perrault and Edouard Perrault, respectively, for the Furness and Packet boats.

On the arrival of the *Carlisle City*, a ship of the Furness line, George Perrault, as being the line pilot, reported for duty. So, too, did petitioner, in obedience to the telegram from Mr. Macpherson. The presence of the two pilots was the result of a mistake. George Perrault, on seeing the telegram, made no objection to petitioner taking the ship, and returned to Montreal. The moment he disappeared the *tour de rôle* pilots claimed the ship. Pilots Labranche, Pleau and Arcand went on board and ordered petitioner off. They also, but unsuccessfully, sought to compel the captain to replace him. Petitioner stood behind the order of his employer and refused to budge until it had been countermanded. The belief of the *tour de rôle* pilots that they had a right to choose a pilot in spite of master or agent was complete. I quote from Arcand's evidence: "I told him (petitioner) we would even bring him before the criminal courts for stealing a boat not belonging to him."

The first point raised by petitioner is that no charge in lawful form was ever laid against or served upon him.

Section 37 of the Harbour Commissioners Act declares that penalties may be recovered in a summary manner under part 58 of the Criminal Code, that is secs. 839 to 909. In another part of the Act (sec. 44) a similar provision appears, but it is subjected to exceptions.

These sections enact in plain terms the manner in which a complaint ought to be made and served. They were seriously ignored. Litigation follows as an almost

certain result. In the present case, however, petitioner chose to appear, plead and attend the investigation. He must be held to have thereby waived the irregularities before conviction which appear on the face of the record.

It is next claimed that as petitioner was required by the agent and captain of the Carlisle City to pilot her to Montreal, failure to do so would have subjected him to penalties. This is only true in so far as the order of the agent was not itself in breach of the respondents' by-laws or regulations.

It is next asserted that the by-laws of the corporation have not been proven. The pamphlet which I find in the record is certified as a true copy of them under the hand and seal of the secretary. This is sufficient to the extent it covers: The Canada Evidence Act, 1893, sec. 12. Have the by-laws relied upon been approved by the Governor-in-Council and published in the *Canada Gazette*? These requirements are asserted to have been fulfilled. It is desirable to have certain proof of them before the Court, as is easily possible: R.S.C. ch. 80, sec. 18; 57-58 Vict., ch. 48, sec. 27; The Canada Evidence Act, 1893, sec. 8. I do not consider these objections further because the judgment of the Court rests upon other grounds.

The conviction declares that it punishes petitioner for a breach of by-law 109, which reads thus: "Any pilot may, subject to the commissioners' approval, agree with the agent of not more than one transatlantic line for special service for a season of navigation on any vessels of such line for not exceeding thirty trips between Montreal and Quebec, either up or down, or with the agent of any gulf port line for similar service on any vessels of such line for not more than the proportionate number of trips which would fall to such pilot if such line employed one pilot for each two vessels.

"No pilot making such agreement shall, during the season of navigation to which the same is intended to apply, be entitled to any duty as pilot by turn or in rotation."

Is this by-law *ultra vires*? If not, is it prohibitive of the acts for which petitioner has been penalized with alternative imprisonment?

I am convinced that the Pilotage Act and 57-58 Vict., ch. 48, enabled respondents to pass a by-law which will make it an offence for a pilot who is selected for service with one transatlantic line to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line.

But does by-law 109 do this? I must find both intention and fact clearly expressed. Suppose the Merchant Shipping Act contained a clause of doubtful intentment which is asserted to mean that shipowners could not engage their captains for more than thirty trips, or put them upon another line under the same management; and further, that the captain himself might be sent to gaol if he did not give way to another licensed captain. Rules of legal interpretation would stand against such a view because of its extreme improbability. The language of the statute would need to be absolutely expressive of the asserted intention. Penal laws are strictly construed.

Now let us analyze by-law 109. It is of two paragraphs. The first permits a pilot to agree with a transatlantic or a gulf port line in the manner therein set forth. The second declares that "no pilot making such agreement shall . . . be entitled to any duty by turn or in rotation." This is not a prohibition. It is not imperative. "Not to be entitled" simply means that a person shall not have a title or right or claim to a certain thing. It certainly does not, in a by-law of this character, forbid

him to enjoy the benefit if obtainable without improper means of inducement. Furthermore, the pilot who was entitled to the Carlisle City, and was on the spot ready to take her, waived his right not in favour of a *tour de rôle* pilot but of petitioner.

The regulation of the pilotage committee, dated 12th May, 1898, which forms part of the record, is without application, and in any event was never invoked against petitioner, either in the complaint or in the conviction.

I have not overlooked the fact that while the judgment rendered by the committee simply imposed a penalty of \$20 without costs, the conviction, as signed, fixed and imposed an imprisonment of thirty days if the fine were not paid.

*Conviction quashed with costs.*

*Angers, de Lorimier, and Godin, for the petitioner.  
Geoffrion, Geoffrion, and Roy for the respondents.*

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## [SUPREME COURT OF NOVA SCOTIA].

BEFORE TOWNSHEND, J., IN CHAMBERS.

## The QUEEN v. HOLLEY.

*Preliminary enquiry—Remand for more than three clear days—Informal remand endorsed on warrant—Accessory—Description of offence—Uncertainty—Irregularity or defect in substance or form—Cr. Code, secs. 61, 138, 586 (c), 578, Code Form P.*

1. Where on a preliminary enquiry a remand is desired for a time exceeding three clear days (Code sec. 586 (c), the justice may remand only by warrant (Code Form P), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient.
2. An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory is void for uncertainty.
3. Such a warrant charges no offence, and neither it nor a remand thereon is validated by Code sec. 578, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary enquiry before the justice.

ARGUED: December 12, 1893.

DECIDED: December 13, 1893.

Motion on the return of a writ of habeas corpus issued under the Crown Rules for the discharge of the defendant, a prisoner in custody under a verbal remand of a justice of the peace on a preliminary examination for the alleged offence hereafter referred to.

The prisoner had been engaged by a Local Temperance Organization to purchase intoxicating liquors from various unlicensed persons in the Counties of Colchester and Pictou, for the purpose of procuring testimony to convict the vendors. "The Nova Scotia Liquor License Act, 1886," and "The Canada Temperance Act," respectively, were in force in those respective counties.

The other facts in connection with the case are fully stated in the judgment of Townshend, J.

*H. McInnes*, for the prisoner.

*W. B. A. Ritchie*, Q.C., for the prosecutor.

HALIFAX, December 13, 1893.

TOWNSHEND, J.—

This is an application for the discharge of Joseph Holley under a writ of habeas corpus. By the return to the writ by James W. Johnson, a justice of the peace for the County of Colchester, and Edmund C. Cribb, constable, to whom it was directed, it appears that the prisoner was arrested on the 7th day of December, instant, and is now detained under a warrant issued by the said Johnson, placed in the hands of Cribb, and a remand endorsed on the warrant. The warrant was issued on the information of one George Thomas, in which Holley is charged "for that he, on or about the 2nd day of December, instant, A.D. 1893, at Truro, in the County of Colchester, did counsel and procure Stanley Murphy, his clerk, servant or agent, to violate the Nova Scotia Liquor License Act of 1886, and amendments thereof."

By the first endorsement it appears the defendant was brought before the justice on the 7th of December, and the examination was adjourned without taking any evidence until the 8th of December, and the defendant was ordered into the custody of Edward Cribb, to be brought before him on that day. By the second endorsement it appears that the further hearing was, by the justice, again adjourned without taking any evidence till the 13th of December, and the defendant ordered into the custody of the said Cribb, to be brought before him on that day. On the 9th of December, on the application of Mr.

McInnes, counsel for defendant, I directed that a writ of habeas corpus should issue to bring the body of the defendant before me, in Halifax, on the 12th of December, together with the cause of his detention. It is contended on the part of the defendant that his detention is illegal on several grounds, among the principal of which are :— (1) That the warrant discloses no offence for which he could be arrested ; (2) That the remand under which he is held is illegal.

By sec. 61 of the Criminal Code “ everyone is a party to and guilty of an offence who (*d*) counsels or procures any person to commit the offence.”

The offence alleged in the warrant is the violation of the Nova Scotia Liquor License Act. Now, by sec. 138 of the Criminal Code, “ everyone is guilty of an indictable offence and liable to one year’s imprisonment who, without lawful excuse disobeys any Act of the Parliament of Canada, or of any legislature in Canada, by wilfully doing any act which it forbids . . . . unless some penalty or other mode of punishment is expressly provided by law.” Now, taking those statutes as the authority for the prosecution, it is not charged that he “ wilfully ” did any act—a necessary constituent of the offence, nor is anything forbidden by the Nova Scotia Liquor License Act specified as having been disobeyed.

The offence charged is the violation of the Nova Scotia Liquor License Act. There is no such offence. It is admitted there are over twenty or thirty offences, no doubt more, under that Act, which may be committed, but no one can contend with reason that it is made an offence to violate the whole Act. Moreover there is a penalty or mode of punishment specified in the Act for everything made an offence under it. As well might a person be arrested under a warrant charging him with violating the Inland Revenue

Act, or the Customs Act, or the whole Criminal Code, under which statutes there are scores of offences. Anything nearer to a general warrant can hardly be found than such a warrant as this. I am, therefore, of the opinion on this ground alone, the defendant should be forthwith discharged from custody. *Commonwealth v. Willard*, 22 Pick. 476; *Reg. v. Heath*, 13 Ont. Rep. 471; *Ex parte Armstrong*, 30 N.B.R. 423.

On the second ground, that the remand was unlawful and the detention therefore illegal, I think he must be discharged. By the Code, sec. 586 (c), the justice may adjourn the hearing from time to time, but in case the remand exceeds three clear days he must do so in writing in the Form P, in the schedule annexed, which he has not done, and no cause whatever is stated in the remand endorsed for the length of time; that is to say, from December 8th until December 13th. It does not appear that the hearing was ever entered upon, and as the affidavits shew that the magistrate refused to accept bail and made the remand to the very day on which the defendant was required as a witness in a prosecution in New Glasgow, it does seem to me that his conduct requires some explanation. It was never intended that criminal procedure should be used in such a way as this.

I am referred by counsel for the prosecutor to sec. 578 of the Code, in which it is provided that "no defect in substance or form shall affect the validity of the warrant," but unless I am to hold this to mean that it matters not whether there is any charge at all, it cannot help this warrant wherein, as I have already stated, there is no offence charged.

I should have hesitated a good deal to intervene when and while this matter was indisposed of by the magistrate, if there had been any ground at all for his detention. As.



already mentioned, I think there is none, and I cannot shut my eyes to what is apparent from the whole proceedings, that this is an unjustifiable attempt to interfere with the administration of the law and to make an improper use of the original procedure for that purpose. The prisoner is therefore discharged.

I shall award no costs, as in my opinion the whole proceedings connected with this affair are most discreditable.

*Order for discharge.*

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[COURT OF KING'S BENCH, MANITOBA.]

BEFORE DUBUC, BAIN AND RICHARDS, JJ.

**THE KING v. TODD.**

*Murder—Manslaughter—Evidence—Confession—Admissibility—Admissions made to detectives specially employed but not peace officers—False representations by detectives—Inducement of gain in future organized crimes.*

1. An inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible.

ARGUED: May 13, 1901.

DECIDED: June 1, 1901.

Crown case reserved. Prisoner was tried for murder, when a question was raised as to the admissibility of certain admissions and confessions by the prisoner.

The following is a copy of the case submitted for the consideration of the Full Court by Killam, C.J.:—

“At a sitting of His Majesty's Court of King's Bench for Manitoba, held at Winnipeg for the trial of criminal matters and proceedings for the Eastern Judicial District,

commencing on the 19th day of March, 1901, Donald Todd was indicted and tried before me on a charge of having, on the 17th day of October, 1899, at the city of Winnipeg, killed and murdered one John Gordon.

The evidence shewed that the dead body of John Gordon was found upon a public street in Winnipeg on the evening of the 17th day of October, 1899, and that his death had resulted from a wound caused by a pistol ball.

There being ground to suspect that Gordon had been murdered, it was the duty of the police force of the city of Winnipeg to undertake and they did undertake the work of ascertaining by whom Gordon was killed and the circumstances thereof.

In the course of their inquiries the said police force came to suspect the above named Donald Todd of the murder of Gordon, and for the purpose of learning whether their suspicions were correct and, if so, of procuring evidence against Todd, the chief officer employed two parties named William McBean and David Yeddeau to act as detectives.

The evidence of the Crown was that both McBean and Yeddeau falsely pretended and represented to Todd that they were criminals who had been guilty of crimes of violence and other crimes, and were members of a gang or body of criminals organized for the purpose of committing crimes. They offered to take Todd into and make him a member of the said gang of criminals if he would satisfy them that he had committed some serious crime, and they represented to him that large profits were likely to result to members of the said gang from its proposed criminal operations.

The evidence for the Crown was that Todd, by the influence of the said pretences and representations, was

led and induced to admit and confess to the said Yeddeau, both orally and in writing, that he (Todd) had shot and killed John Gordon.

In their said acts, pretences and representations the said McBean and Yeddeau acted under the authority and by the direction of the chief officer of the said police force, but they were not members of the force or otherwise in authority in respect of the said matters except by virtue of their special employment aforesaid.

The said Todd made the aforesaid admissions and confessions without any notice or knowledge that McBean and Yeddeau or either of them, were or was employed as aforesaid, and without notice or knowledge of any facts constituting either McBean or Yeddeau a person in authority with respect to him (Todd) or to the death of Gordon.

Objection was taken on the part of the defence to the reception of evidence of the said admissions and confessions on the ground that they were not voluntary, but I received such evidence subject to a case to be reserved upon the point.

Apart from the said admissions and confessions to Yeddeau there was evidence warranting the conviction of Todd, but the said admissions and confessions were, in my opinion, calculated materially to influence the verdict of the jury.

The said Todd was convicted of manslaughter, and sentenced to imprisonment for two years.

The question for the opinion of the court is :

Was the evidence of the prisoner's admissions and confessions to David Yeddeau properly admitted ? "

*H. M. Howell, K.C., and E. L. Howell, for the prisoner :*  
We admit that Todd did not know that Yeddeau was a person in authority or that he was connected with the

Crown or the police : *Great Fire of London Case*, 6 How. St. Tr. 807. As to the principle of confessions being received : *Rex v. Warickshall*, 1 Leach 299. The influences brought to bear on Todd were such as to make it appear to be to his interest to say he had committed a crime : *Reg. v. Baldry*, 2 Den. C. C. 432. There is a difference in practice as to the admissibility of evidence in civil and criminal cases. A confession obtained by pressure can be received for what it is worth in civil cases, but it is not receivable at all in criminal cases. Confessions are rejected when obtained by pressure, not because the court presumes the statement is untrue, but because of the principle that the truth of the statement becomes uncertain : *Reg. v. Baldry*, 2 Den. C. C. 432. The Crown must shew affirmatively that the confession is voluntary : *Reg. v. Thompson*, [1893] 2 Q.B. 12. A bought confession is not free and voluntary. The reward promised here was a monetary one. There was everything here to induce Todd to lie. We attack the proposition laid down in Taylor on Evidence, § 880, that a promise of a merely collateral favor is not an inducement to prevent the admission. All the cases cited in Taylor on Evidence are nisi prius ones : *Rex v. Green*, 6 C. & P. 655 ; *Rex v. Lloyd*, 6 C. & P. 393. *Reg. v. Cain*, 1 Craw. & D. 36, turned on the duty of the witness : see foot note to § 880 in Taylor on Evidence ; under precisely the same circumstances two English judges declined to admit the evidence. As to the promise being a temporal one and not a spiritual one : *Rex v. Gilham*, 1 Moo. C. C. 186. Other cases on the point are : *Reg. v. Blackburn*, 6 Cox C. C. 333 ; *Reg. v. Drew*, 8 C. & P. 140 ; *Reg. v. Macdonald*, 2 Can. Cr. Cas. 221.

*R. A. Bonnar*, for the Crown : The case submitted shews there was sufficient other evidence to warrant con-

viction. For the purposes of this case, the Crown is willing to concede Mr. Howell's argument and simply ask for a new trial, as the Crown is not desirous of availing itself in any way of what might possibly be considered objectionable evidence.

*By the Court.*—Are you willing to concede on behalf of the Crown that Mr. Howell's contention as to the law is correct?

*Mr. Bonnar:* I cannot do that.

DUBUC, J.—

After Mr. Howell, the prisoner's counsel, had closed his argument, Mr. Bonnar, on behalf of the Crown, said that had not the learned Chief Justice, who tried the case, stated that, apart from the admissions of Yeddeau, there was evidence warranting the conviction of the prisoner, he would concede Mr. Howell's argument and ask for a new trial. He would not, however, take the responsibility of admitting that the confession of the prisoner made to Yeddeau was not admissible in evidence. He added that, at the new trial, if one is ordered, the Crown will not tender the evidence of Yeddeau. This leaves it to the court to decide whether the confession of the prisoner to Yeddeau was properly admitted at the trial.

The well known rule as to the admission or rejection of a confession made by a prisoner is to the effect that no confession by the prisoner is admissible which is made in consequence of any threat or inducement of a temporal nature, having reference to the charge against the prisoner, made or held out by a person in authority; and, as stated by Roscoe in his work on Criminal Evidence, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposi-

tion. But the strict application of that rule is more or less influenced by the peculiar circumstances of each case; and in each instance a good deal is left to the discretion of the judge trying the cause: Taylor on Evidence, § 796; Russell on Crimes, 4th ed., vol. 3, p. 368.

It is claimed that in this case there was an inducement of a temporal nature held out to the prisoner. It may be questioned whether an inducement of such a vile and base kind could influence even a man of the prisoner's character to falsely confess that he had committed murder; but the question we have to determine is whether the inducement was such as to come within the rule, and the statement to be held inadmissible in evidence.

It is clear that, in two particulars, the alleged inducement failed to come within the proposition above laid down: (1) It was not held out by a person in authority; (2) It was not made in reference to the charge on which the prisoner was afterwards brought before the court.

Although Yeddeau was employed by the chief of police to try to obtain from the prisoner an admission that he had murdered Gordon, he cannot be held, technically or otherwise, to have been a person in authority; and even if he could be so considered, the prisoner could not know or even suspect it; and he could not, therefore, be influenced by the idea that Yeddeau was a person in authority and could assist him in escaping the consequence of the charge. It was held in *Reg. v. Moore*, 2 Den. C. C. 522, that the wife of a person in whose house an offence is committed, such person not being prosecutor nor engaged in the apprehension, prosecution or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes evidence.

As to the other point, the inducement was not made in reference to the charge, because there was no charge then laid against the prisoner; and, even if the charge had been laid at the time, the inducement had no reference whatever to it or to any means by which he could be assisted in exonerating himself from the same.

In *Rex v. Warner*, referred to in Russell on Crimes, p. 395, and in Taylor on Evidence, § 803, the prisoner was in custody on another charge when he made the confession, and was not suspected at the time of the offence for which he was on his trial, and he made a statement. It was submitted on his behalf that if a promise was held out to him it was immaterial what the charge was. Little-dale, J., said: "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." And the confession was admitted.

The means employed in this case to obtain the confession were contemptible; but it does not seem to be a sufficient ground for excluding the evidence. It has been held in *Rex v. Burley*, referred to in 1 Phill. Ev. 406, that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, and even though some artifice has been used to draw him into that supposition. The case is mentioned in Roscoe's Criminal Evidence, Taylor on Evidence, and Russell on Crimes.

The rule respecting the exclusion of evidence of confession made by parties charged with some crime is not an iron rule to be applied arbitrarily; the evidence is not rejected for the purpose of shielding criminals or because confessions made after inducement held out are presumed to be untrue. It is properly stated by Pollock, C.B.,

in *Reg. v. Baldry*, 2 Den. C. C. 430, where he says: "The law does not presume that it is untrue, but rather that it is uncertain whether a statement so made is true." It is a wholesome rule to be applied with discretion. The real test or criterion is whether, after the inducement is held out, the accused is so influenced by it as to falsely make an admission of guilt. A few cases are mentioned of parties making, for some temporal advantage, confessions of crime they had not committed. It is, however, so much against the primary and strongest instinct of human nature for a man to confess the commission of a crime of which he is innocent that, as a general principle, a voluntary admission or confession of crime is considered by some authorities as the highest and most satisfactory evidence of guilt. But, in order to guard against any possible error of justice, the rule has been adopted that any confession obtained through threats or inducement is not to be received in evidence. The point is not that the evidence is in itself technically objectionable: that, on sound principles of law, it should be strictly rejected; it depends rather on the question whether the statement made under such circumstances is true or should be deemed to be true or not; or whether the accused may not have been induced to make an untrue confession in the hope of obtaining thereby some kind of worldly advantage.

On the evidence being offered, it is for the judge to say whether the confession is receivable or not; and, if received, it is for the jury to find what weight should be attached to it.

In this case, the confession did not come within the rule by which evidence of that kind is generally excluded. Therefore the evidence was, in my opinion, properly received.



The question submitted to the court should be answered in the affirmative.

BAIN, J.—

It appears from the statement of the case by the learned Chief Justice that, apart from the evidence of the prisoner's confession or admission to Yeddeau that is in question, there was other evidence that would have warranted his conviction, but that the evidence of this confession was calculated materially to influence the verdict of the jury. If the question reserved as to the admissibility of the evidence should be answered in the negative, the result would, therefore, be that a new trial would be ordered; and on the argument Mr. Bonnar, who appeared for the Crown, instead of supporting the admissibility of the evidence, stated that it was the wish of the Crown that there should be a new trial, and he stated, also, that at a new trial the Crown would not tender the evidence of the confession. But though Mr. Bonnar would not support the admissibility of the evidence, he was not prepared to concede that as a matter of law it was inadmissible; and it seems to me that it is the duty of the court to consider and decide the question reserved as a matter of law, notwithstanding that it is the wish of both the Crown and the prisoner that it should be answered in the negative. The evidence of the confession that was made to Yeddeau under the circumstances stated in the case was admitted at the trial; and, unless it appears that as a matter of strict law the evidence was inadmissible, the question will have to be answered in the affirmative.

In *Rex v. Lambe*, 2 Leach 625, Mr. Justice Grose, delivering the opinion of the twelve judges, said that the

general rule is that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. In *Reg. v. Thompson*, [1893] 2 Q. B. 12, it was held that in order that a prisoner's confession may be given in evidence against him, it must be first affirmatively proved that such confession was freely and voluntarily made; and Mr. Howell argues that the confession here cannot be considered to have been a free and voluntary one because of the inducement that was held out to the prisoner to make it.

It appears from the statement of the case that Yeddeau and McBean, neither of whom was a peace officer, had been specially employed by the chief of police as detectives to see if they could procure evidence which would connect the prisoner with the murder of Gordon, and that they pretended to the prisoner that they belonged to a gang of organized criminals, from the operations of which large profits were likely to be made, and they offered to make him a member of the gang if he would satisfy them that he had committed some serious crime; and it was by the influence of this inducement that the prisoner confessed to Yeddeau that he had killed Gordon.

While the general principle is very clear that a confession by a prisoner is not admissible against him unless it is shewn that it was made freely and voluntarily, it is not possible to settle as a rule of law the facts and circumstances that shall be deemed sufficient in all cases to make a confession a voluntary one or the reverse; and, as the question must always be a mixed one of law and fact, it is not to be wondered at that the reported cases are not always consistent, and that they have failed so far to mark

out precisely the grounds of admission and rejection. It may be taken to be settled, however, as a general proposition, that no confession is admissible which is made in consequence of an inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority. But this principle would not exclude the evidence of the confession in the present case, for this reason, if for no other, that the inducement that was held out had no reference to the charge that was afterwards made against the prisoner, or any other charge, and Mr. Howell's argument was directed to shew that the principle should be extended to exclude confessions procured by inducements that were collateral to and had no reference to the charges against the persons making them.

In Hawkins' Pleas of the Crown, Bk. II., ch. 46, sec. 36, it is said that a confession which is obtained from a defendant either by the flattery of hope or the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; and the statement, although it is in very general terms, suggests the idea that the inducement which would exclude the evidence must be in some way connected with the charge against the accused, and as having operated on his mind either by exciting some hope of escape or fear of punishment. And, while I have not found any case in which it is authoritatively laid down that the inducement must have reference to the charge, still in all the cases I have looked at where the evidence was excluded because of an inducement, the inducement did have reference to the charge more or less directly. But, as it is said in Roscoe's Criminal Evidence, p. 43, it is certainly possible to conceive cases in which a much stronger inducement might be held out to a prisoner than one having reference to an escape from the charge of which he is accused; and the learned author adds that

this question whether the inducement must have reference to the charge has scarcely been fully discussed. All the text books, however, lay down the rule that the inducement must refer to the charge, and Sir James Stephen, in his Digest of the Laws of Evidence, is very explicit on the point. In Article 22 he says: "No confession is deemed to be voluntary if it appears to the judge to have been caused by an inducement, threat or promise, proceeding from a person in authority, and having reference to the charge against the accused, . . . and if (in the opinion of the judge) such inducement, threat or promise gave the accused person reasonable ground for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him;" and he adds, "a confession is not involuntary only because it appears to have been caused by an inducement collateral to the proceedings, or by inducements held out by a person not in authority."

I have no doubt at all that the law is, as Sir James Stephen states it, that a confession is not involuntary only because it was brought about by an inducement that is not connected with the charge; but this still leaves the question an open one, whether the judge, if he considers that the inducement, though it did not refer to the charge, was of such a nature as to be likely to produce an untrue confession, should reject the evidence of the confession as an involuntary one, or must he admit the evidence and leave the jury to decide as to its credibility? This is an important question; but, as I do not find it necessary to decide it in order to dispose of the case, and as it was not discussed in the argument, I express no opinion upon it.

I may remark, however, that at the time the confession was made by the prisoner in the present case, he had not been accused of having killed Gordon and, as far as

appears from the case, he did not even know that he was suspected of the crime, and to obtain the benefit that was held out to him it was not necessary that he should confess that he had killed Gordon, and the confession of any other serious crime would, as far as he knew, have served the purpose as well. I am not sure, therefore, that it could be considered that the inducement was one that was calculated to produce the confession that he had killed Gordon if it were not the case that he had killed him. And I would find it difficult to distinguish the case in principle from the numerous cases there are in which evidence of confessions obtained from accused persons by trick and artifice quite as discreditable as that used here has been held to be admissible.

But another essential element that has to be considered in deciding whether a confession is voluntary or not is the position of the person who held out the inducement, for it is now clearly established, I think, that it is only an inducement held out by a person in authority that will make a confession involuntary. In *Reg. v. Thompson*, [1893] 2 Q.B. 12, Cave, J., said a confession must be free and voluntary. "If it flows from hope or fear, excited by a person in authority, it is inadmissible." And Mr. Howell made no attempt to argue that McBean and Yeddeau were persons in authority in the sense in which the term is used in this connection; he admitted, indeed, that they were not, and, if they were not, the fact, it seems to me, is conclusive as to the answer to the question.

A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the

accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind; Greenleaf on Evidence, § 222. Now it is expressly stated in the case that when the prisoner made the admission he was without notice or knowledge of any facts that could constitute either of the two men persons in authority; and, this being so, it could not be contended that as to the prisoner they were persons in authority; and *cessante ratione, cessat lex*.

In *Rex v. Row*, R. & R. 153 (1809), where a prisoner had been arrested for theft and some of his neighbours had admonished him to consider his family and tell the truth, the judges were of the opinion that evidence of a confession he afterwards made was admissible, "because the advice to confess was not given or sanctioned by any person who had any concern in the business." However, in *Rex v. Spencer* (1835), 7 C. & P. 776, Parke, B., said there was a difference of opinion among the judges whether a confession made to one who had no authority ought to be received; and the cases shew that there was no uniformity in the practice in admitting or excluding evidence of such confessions. But in *Reg. v. Taylor* (1839), 8 C. & P. 733, Patteson, J., said that it was the opinion of the judges that evidence of any confession is receivable unless there has been some inducement held out by some person in authority; and in *Reg. v. Moore* (1852), 2 Den. C. C. 522, this opinion was embodied in a considered judgment. There it was held that where an inducement in reference to the charge was held out to the accused by the wife of the person in whose house an offence was committed that did not concern the master or mistress and that was in no way connected with the management of the house, the

mistress was not a person in authority, and that evidence of the confession was admissible. Parke, B., in delivering the judgment of the court, said: "One element in the consideration of the question as to the confession being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down by which we are bound that, if the inducement or threat has been held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate and constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible." In 6 A. & E. Ency. of Law 548, it is said "The doctrine in England at present, and the prevailing doctrine in the United States, is that evidence of any confession is receivable unless there has been some inducement held out by some person who had, or was supposed to have authority to secure the accused the promised good."

I think it must be held, therefore, that as the inducement was not held out to the prisoner by anyone in authority, the confession he made under the influence of that inducement was a voluntary one, and that the evidence of the confession was properly admitted. The question re-

served should be answered in the affirmative and the conviction confirmed.

*Conviction affirmed.*

**Note:** *Confessions—Admissibility in evidence.*

See *R. v. Elliott*, 3 Can. Cr. Cas. 95 (Ont.) and Note to same, pp. 99-101; Notes 1 Can. Cr. Cas. 398-401; 2 Can. Cr. Cas. 150-153; and *R. v. Charcoal*, 4 Can. Cr. Cas., p. 93 *ante*.

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, RITCHIE, AND TOWNSHEND, JJ., AND  
GRAHAM, EQUITY JUDGE.

**THE QUEEN V. HAWES.**

*Appeal—Theft under \$10—Summary trial by magistrate with consent—Review of question of law—Procedure must be by “stated case” and not by “case reserved”—Cr. Code secs. 742, 783, 786, 900.*

1. A magistrate trying a charge of theft of goods of the value of less than \$10 under the summary trials procedure (Code sec. 783 and 786) with the consent of the accused, is not a “court or judge having jurisdiction in criminal cases” within Code sec. 742 allowing an appeal by way of case reserved.
2. *Seem*, the proper mode of review of any question of law involved on such a trial is by way of “stated case” under Code sec. 900.

ARGUED: April 6, 1900.

DECIDED: July 18, 1900.

THIS was a case reserved for the opinion of the Court by the Stipendiary Magistrate in and for the city of Halifax as follows:—

“The defendant was tried before me with his own consent, and the following facts appeared on such trial:

A lot of wrought and scrap iron was discharged from the steamer *Duart Castle* at Pier 4, Deep Water, in the city of Halifax, 31st October last. It was placed in



railway cars, in bond, and remained in bond till after November 2nd. There was no other iron at Pier 4. November 1st defendant sold Brister, a junk dealer, a small lot of iron that resembled the iron discharged at Pier 4 from the *Duart Castle*. This iron was brought by defendant on a hand-cart belonging to Brister, used on the premises, which included a wharf called Central Wharf. Brister's clerk said he presumed from that fact that the iron sold was brought to the wharf by boat. Next day, November 2nd, a boat with one person in it was seen by a customs officer to leave Pier 4. This same officer, ten minutes later, on Central Wharf, saw defendant in a boat at head of the wharf taking out and landing iron similar to that at Pier 4. Defendant was asked by the customs officer then if he knew the iron he was handling was taken from the customs department at Deep Water. Defendant said nothing, and the officer then went to take the oars of the boat, upon which defendant jumped out of the boat and ran along up the wharf. The same day a clerk of the consignees of the iron saw on the Central Wharf above referred to, and in the boat at the head of the wharf, iron similar to that from the *Duart Castle*, which he did not particularly identify, but which he believed to be the same. He had previously stated that he had seen the iron that came from the *Duart Castle*. Defendant was convicted of the theft of a quantity of iron, the property of the Queen.

I reserve the question whether, as a matter of law, there is any evidence of a crime to warrant a conviction."

HALIFAX, April 6, 1900.

A. Morrison, for the prisoner: [TOWNSHEND, J.—Can the Stipendiary reserve a case?] Crim. Code sec. 743. The word "court" in this section includes a magistrate where

he has jurisdiction over the offence. Crim. Code sec. 782. [RITCHIE, J.—“Court” is not defined in that section. GRAHAM, E.J.—Unless you can shew me a decision to the contrary, I say that a magistrate is not a court at all.] Previous to the Code a writ of error would always go to a magistrate’s court. [RITCHIE, J.—I cannot assent to that. GRAHAM, E.J.—A writ of error only lay to a court of record.] *The Queen v. Hollingsworth*, 2 Can. Crim. Cas. 291; *The Queen v. Strauss*, 1 Can. Crim. Cas. 103; *The Queen v. Worth*, 1 Can. Crim. Cas. 231; Crim. Code sec. 900. [GRAHAM, E.J.—That section does not apply. That relates only to summary convictions.] There is no evidence that a crime was committed: Russell on Crimes, p. 215; *The Queen v. Winslow*, 3 Can. Cr. Cas. 215.

*J. W. Longley*, Attorney-General, contra, was not called on.

HALIFAX, July 18, 1900.

The judgment of the Court was delivered by

RITCHIE, J.—

The property alleged in this case to have been stolen, being of less value than \$10, the accused was, with his own consent, tried summarily before the Stipendiary Magistrate of the city of Halifax under sec. 786 of the Criminal Code, and convicted of theft, the offence charged. At the trial the magistrate, at the request of the accused, reserved a question for the opinion of this court under sec. 742 and following sections of the Code.

On the argument the preliminary point was raised as to the authority of the Stipendiary Magistrate to reserve this case. Under sec. 742 and the sections immediately following it, a reserved case can be stated only by a court

or a judge having jurisdiction in criminal cases, and by a magistrate in proceedings under sec. 785. This sec. 785 has no application to the case before us, but the exception, I think, shews that it was not the intention of the Legislature to allow a magistrate to reserve questions in all cases of summary convictions; if it was, the exception would not have been made. Besides this there are other provisions in the Criminal Code, contained in sec. 900, which enable a magistrate, when either of the parties desires to question a conviction made on a summary trial, to state a case for the opinion of this court. This, I think, is the only clause under which a case may be stated in a proceeding like this, and secs. 742 to 751 have no application. The provisions of sec. 900, admittedly not having been complied with, there is no proper case before us upon which we have authority to give an opinion.

*Application dismissed.*

**Note:** *Summary trial—Right of appeal or of stated case—Crim Code sec. 879, 900.*

Section 900 of the Code makes provision for the review by way of "stated case" of a justice's decision in respect of error of law or excess of jurisdiction, and by its own terms is limited to the questioning of "a conviction, order, determination or other proceeding of a justice *under this part*," i.e., under Part LVIII. of the Code, which part deals with the subject of "summary convictions."

Then by the last section of Part LV., relating to "summary trials" it is enacted that the provisions of part LVIII. shall not apply to any proceedings under Part LV. This indicates that the procedure by "stated case" does not apply to a conviction made under the "summary trials" procedure of Part LV., notwithstanding the dictum of the court in the *Hawes Case*, *supra*.

In *R. v. Egan*, 1 Can. Cr. Cas. 112 (Man.), it was held by Killam, J., that a person convicted under sec. 783 (a) on a similar charge had no right of appeal as the effect of sec. 808 is to prevent the application of any of the provisions of Part LVIII. in which are found the sections as to appeals from summary convictions, to convictions under Part LV. The decision of Wurtele, J., in *R. v. Racine*, 3 Can. Cr. Cas. 446 (Que.),

**Note—Continued.**

is to the same effect. The sections as to stating a case being likewise within Part LVIII., the same result would follow.

If, however, the summary trial takes place before *two justices* sitting together a right of appeal is given by sec. 782 (a) as amended by 58-59 Vict. c. 40 "in the same manner as from summary convictions under Part LVIII." and sections 879 *et seq.* are by it expressly made applicable in that event. This was held in *R. v. Nixon* (1899), 35 C.L.J. 636 (Ont.), per Ferguson, J., to be an additional reason for holding that there is no right of appeal in other cases of summary trial.

It is to be observed that, although there is no appeal where the proceedings are taken under sec. 783, an appeal by way of reserved case may be had when the magistrate's jurisdiction is dependent upon sec. 785, which now applies to police magistrates of cities and towns in all the provinces (amendment of 1900), but was formerly limited to Ontario.

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[COUNTY COURT OF VANCOUVER, BRITISH  
COLUMBIA.]

BEFORE IRVING, J., OF THE SUPREME COURT.

**RE LAMBERT.**

*Sunday observance—By-law—"Keeping open" of barber shop—Vancouver, B.C., Incorporation Act, 1900.*

1. A conviction for "keeping a barber shop open" on Sunday, contrary to a municipal by-law, cannot be supported upon the mere admission of the accused, when called upon to plead, that he had shaved customers in his shop on the day named.
2. *Seemle*, a barber who exercises his trade at his shop with the doors barred cannot be said to be "keeping open."

ARGUED: December 5, 1900.

DECIDED: December 19, 1900.

Appeal from a conviction of Joseph Lambert by the Police Magistrate of Vancouver.

An information was preferred by G. W. Isaacs charging that the appellant, on the 21st October "did have his

barber shop open between the hours of twelve on Saturday night and five on Monday morning, contrary to the form of the by-law in such case made and provided."

The appellant, when called upon in the Police Court to plead to the charge, admitted that he had shaved customers on the Sunday in question, and the Magistrate thereupon came to the conclusion that he had "kept open" and convicted him under the by-law.

*Cane*, for the appellant.

*Hamersley*, for the respondent.

VANCOUVER, December 19, 1900.

IRVING, J.—

I have taken time to examine the authorities cited to me, as the question raised is one of importance and should be looked at from the point of view as well of the public as of the barbers. The effect of the by-law is to deprive a number of persons of a very great convenience—I use the word advisedly (*Phillips v. Innes* (1837), 4 Cl. & F. 234)—and to interfere with the business of a certain class of tradespeople.

In *Palmer v. Snow*, [1900] 1 Q.B. 725, a decision on 29 Car. 2, Cap. 7, it is said that a barber is not a person who is prohibited by the law of England from exercising his calling on Sunday. Compare R.S.B.C. 1897 Cap. 177, where 29 Car. 2, Cap. 7 is set out. The Legislature in 1900, conferred on the City of Vancouver power to "prohibit the keeping open of barber shops on Sunday, and during such hours of each night as may be thought expedient." The Council thereupon passed the following by-law: "All barber shops within the City of Vancouver shall be closed from the hour of twelve midnight of the clock on Saturday night till five of the clock on Monday

morning thereafter, and no person shall, during such prohibited hours, carry on or exercise the trade or calling of a barber within the City."

It will be noticed that the by-law has gone beyond the statute in declaring that no barber shall, during the prohibited hours, carry on or exercise his trade or calling.

The question for me is whether the Legislature has, upon a proper construction of the language it has employed, authorized the City to pass a by-law in the terms employed in the by-law in question. What it undoubtedly has done is to authorize the Council to pass a by-law prohibiting the keeping open. To prohibit the keeping open is one thing, to forbid the exercise of their calling is another thing and a different. It is quite possible for a barber to exercise his calling and not have a shop at all. I do not see how the City has any authority under the Act to deal with such a case, and yet they have, by by-law, professed to do so.

Where the Legislature has meant to confer a larger power on the Council, as for example, to regulate or prevent the exercise of any trade or calling, it has usually said so in plain language. (Compare sub-section 96 as to peddlers; sub-section 102 as to bill posters.) There is nothing in sub-section 20 to shew that a larger interpretation of the language is called for than the words used, in their plain meaning, import. The Provincial Legislature may very well have said, "For the better observance of Sunday, the City Council may compel barbers' shops to be closed;" but who can say that it was the intention to go further and prohibit a barber from exercising his trade on his premises behind closed doors, or in the private house or rooms of his employers? Mr. Cane pointed out many cogent reasons why this power should not be conferred on the Council of a City which is the terminus of a railway

and where travellers are continually arriving or departing after or upon long trips upon which shaving or hair cutting is impossible. And, although I am not concerned with the question of expediency, I must not, in construing the Act, lose sight of the circumstances under which it was passed, and of the locality affected by it. At any rate the Legislature has not used express words to that effect and I think the rule of strict construction applies to the words they have used.

All statutes which encroach upon the rights of a subject, whether as regards person or property, should be interpreted, if possible, so as to respect such rights. The Legislature having, by the use of an ambiguous expression, left a reasonable doubt as to its meaning, the benefit of that doubt should be given to the subject.

Now, as to the facts of this case. The accused when called upon in the Police Court to plead to the charge admitted that he had shaved customers on the Sunday in question, the Magistrate thereupon came to the conclusion that he had "kept open" and convicted him under the by-law. These facts were stated to me on the appeal and my opinion sought as to the validity of the by-law. In my opinion a barber by shaving customers on a Sunday does not necessarily "keep open," and, as no evidence of "keeping open" was given I think the appeal should be allowed.

*Appeal allowed with costs.*

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## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, VAN WART  
AND MCLEOD, JJ.

**Ex parte GIBERSON.**

*Justices' summary procedure—Jurisdiction of magistrate—Warrant of arrest executed by unqualified person—Illegality of arrest as affecting jurisdiction—Con. Stat., N.B., c. 99, s. 69.*

1. If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose.

ARGUED: February 4, 1898.

DECIDED: April 23, 1898.

Motion for a rule nisi calling upon Neil McQuarrie, police magistrate of the Andover and Perth Civil Court, to shew cause why a writ of certiorari should not issue to bring up a certain conviction made by him on the 22nd January last, whereby the defendant was adjudged to pay a fine of \$50 and costs for selling liquor without a license, on the following grounds:

1. That there was no evidence to warrant a conviction.
2. That the warrant upon which the defendant was arrested and brought before the convicting magistrate in the first instance was executed by a constable who was not qualified under Con. Stat., c. 99, s. 69.

*Thomas Lawson*, for the motion.

FREDERICTON, N.B., April 23, 1898.

The judgment of the Court was delivered by

VANWART, J.—

This is an application for a rule nisi for a certiorari to remove into this Court a conviction of the applicant for



unlawfully selling liquor without a license. The conviction was made by the police magistrate of the Andover and Perth Civil Court on the 22nd day of January last. The rule was moved on two grounds :

(1) No evidence to warrant a conviction.

(2) That the person who executed the warrant and arrested the defendant was not a legally qualified constable.

The evidence showed that the defendant was driving a horse attached to a peddling box on runners through the country, and as he met some persons on the road he waved his hand to them and they went to the box, and after some conversation purchased liquor. A man who was with the defendant opened the box and handed out the liquor. The team and box belonged to the defendant, and he afterwards, in the presence of the constable, unlocked the box and took out a bottle of gin. He spoke of the team as his, and had the key of the box in his possession. Under this evidence, uncontradicted, I think that the magistrate was justified in making the conviction.

It is not denied that the constable was not a ratepayer upon real or personal property or income in the parish for which he was appointed, and was not rated and had not paid any rates for the year previous.

The objection is that the defendant was arrested on a warrant, in the first instance, by the constable, and that the arrest was illegal, and the magistrate had no jurisdiction to proceed because the constable was not qualified, as required by Con. Stat., N.B., c. 99, s. 69, to be appointed to the office.

I think that there is nothing in the objection. It matters not by what means the defendant is brought before the magistrate. If in fact he is present, and the magistrate has jurisdiction over the person and offence, he

may lawfully proceed with the hearing. The improper arrest does not go to the jurisdiction of the magistrate. The grounds for the decision in *Regina v. Hughes*, 4 Q.B.D. 614, are applicable to this case. I think that the rule should be refused.

*Certiorari refused.*

**Note:** *Jurisdiction of magistrate—Irregular process cured by appearance.*

See *McGuiness v. Dafoe*, 3 Can. Cr. Cas. 139 and Note to same, pp. 150, 151.

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[COURT OF KING'S BENCH, MANITOBA.]

BEFORE DUBUC, BAIN AND RICHARDS, JJ.

**THE KING v. FINLAY.**

*Resisting peace officer in execution of his duty—Inferior court—Bailiff enforcing void civil process—Replevin outside of territorial jurisdiction—County Courts Act (Man.)—Crim. Code, sec. 144.*

1. Where the process of an inferior court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the court, such process is insufficient upon which to base a conviction for resisting the officer in its execution.

ARGUED: May 14, 1901.

DECIDED: June 1, 1901.

Crown case reserved. At a sitting of His Majesty's Court of King's Bench for Manitoba for the trial of criminal matters and proceedings held at Winnipeg for the Eastern Judicial District, commencing on the 19th day of March, 1901, Robert Finlay and John E. Burke were tried before Killam, C.J., upon an indictment containing five counts. The first count charged the defendants with having, at Tyndall, in the Eastern Judicial District, unlawfully and wilfully obstructed one Richard B. Vint, a peace officer, in the execution of his duty to seize certain horses under a writ of replevin issued out of

the County Court of Winnipeg. The second count charged the defendants with having, at Tyndall aforesaid, unlawfully resisted Vint in the lawful execution of a writ of replevin issued out of the County Court of Winnipeg against a team of horses. The remaining three counts contained charges of assault upon Vint.

All of the charges arose out of an attempt by Vint to execute a writ of replevin issued out of the County Court of Winnipeg at the suit of Francis Arthur Drummond against Finlay and Burke for the replevying of two horses. At the time of the issuing of the writ of replevin and thence until after the happening of the event constituting the alleged offences, the horses referred to therein were within the Eastern Judicial District but outside the territorial limits of the Judicial Division of Winnipeg and within the territorial limits of the Judicial Division of West Selkirk.

On the 31st day of January, 1901, the judge of County Courts for the Eastern Judicial District, in which the Judicial Division of Winnipeg is situate, made an order directing that Drummond be at liberty to bring an action in the County Court of Winnipeg to replevy the horses. On the 1st day of February, 1901, after having made and filed the affidavit required by statute, Drummond obtained from the County Court of Winnipeg a writ of replevin directed to Jacob Hall Holman, bailiff, requiring Holman to replevy the horses at the suit of Drummond against Finlay and Burke.

The bond required by the 215th section of the County Courts Act was executed and delivered to Holman, who thereupon made and signed a warrant in writing duly appointing Richard B. Vint, in the indictment named, as bailiff to execute the writ and giving him full power and authority therefor.

Thereupon Vint, with an assistant, proceeded to a place called Tyndall within the Judicial Division of West Selkirk and without the Judicial Division of Winnipeg and there found and took possession of the horses referred to in the writ. Shortly thereafter, and while the horses were still in the possession of Vint at Tyndall, the defendants, forcibly and against the will of Vint, took the horses out of the possession of Vint and retained the same and thereby prevented Vint from further proceeding in the execution of the writ. In so doing the defendants claimed that the County Court of Winnipeg had no jurisdiction to issue the writ and that Vint had no lawful authority to seize the horses.

At the trial objections were taken on the part of the defence that Vint was not acting lawfully or in the execution of his duty in the attempted execution of the writ of replevin on the ground that the County Court of Winnipeg had no jurisdiction to maintain the action or to issue the writ. Killam, C.J., overruled the objections, subject to a case to be reserved for the consideration of the Full Court.

The jury convicted the defendants upon the first two counts and acquitted them on the charge of assault. Sentence was reserved and defendants released on bail to appear at the next sitting of the court for the trial of criminal matters and proceedings in the Eastern Judicial District to receive sentence.

The questions for the consideration of the court were as follows :—

- (1) Was the defendants' obstruction of Vint an obstruction in the execution of his duty ?
- (2) Was the defendants' resistance of Vint a resistance in the lawful execution of process ?

*F. H. Phippen*, for prisoners. The question is: Was Vint authorized to seize the horses ? They were outside

the Winnipeg County Court district when the writ was issued and when the seizure was made, and the prisoners obstructed the taking. Had the county court judge power to order the issue of the writ for execution outside of the Winnipeg district? If not, the writ and the proceedings under it were illegal. The court had no jurisdiction to issue the writ: The County Courts Act, R.S.M., ch. 33, secs. 72, 74. Replevin is limited by sec. 204 as to its jurisdiction, which is local to where the goods are situate and not local (as sec. 72 is) to defendant's residence or place where the cause of action arose. "Unless otherwise ordered," in sec. 204, would not, by itself, be sufficient to authorize the issue of a writ from a division other than the one where the goods are situate. These words mean "unless otherwise ordered" specifically by the Act. After replevin has been executed the plaintiff may apply, under sec. 74, to change the place of trial. The earlier Acts shew the meaning of sec. 204; 1887, ch. 9, secs. 48, 152; 1891, ch. 2, secs. 3, 18. The provision for cases where goods are in other divisions shews that the limits of divisions are to be the tests. As to the protection of bailiff acting under an apparently correct writ: *Reg. v. Monkman*, 8 Man. R. 509.

*George Patterson*, for the Crown: The words "unless otherwise ordered," in sec. 204, apply to both place of issue and place of trial. The Act respecting the Revised Statutes shews (sec. 5) the whole clause must be read as it is found in the Revised Statutes and without reference to the origin of the enactment. The writ protected the bailiff and the prisoners were guilty whether the writ was regular or not. The writ was a justification: Addison on Torts, 149; *Collett v. Foster*, 2 H. & N. 360; *Andrews v. Marriis*, 1 Q.B. 3; *Ritz v. Froese*, 12 Man. R. 346.

BAIN, J.—

It appears that the writ of replevin was issued out of the County Court of Winnipeg on the order of the Judge of County Courts for the Eastern Judicial District. The horses, however, when the writ was issued and when the bailiff attempted to take possession of them, were outside the territorial limits of the County Court of Winnipeg, and the contention of the defendants is that there was no jurisdiction in the County Court of Winnipeg to issue the writ and that the bailiff had no lawful authority to take possession of the horses.

Section 204 of The County Courts Act provides that before any writ of replevin shall issue, an affidavit shall be "filed with the clerk of the court out of which the writ is to issue (which said court is to be the one for the judicial division in which the property to be replevied is situated and in which the action shall be tried, unless otherwise ordered,) containing a description," etc.; and the decision of the question turns upon the construction of the words in this section within the brackets. Reading them just as they stand, the words "unless otherwise ordered" would appear to modify both the direction as to the court out of which the writ is to issue and that as to the court in which the action is to be tried. It is clear, however, if we look at the provisions of the two enactments that have been embodied in this section of the Revised Statutes that this was not what was originally intended, but Mr. Patterson argues that we must give the words the meaning they carry on their face in the Revised Statutes, and that we should not look at the previous enactments to see how they should be construed.

Section 5, sub-sec. 2, of the Act respecting the Revised Statutes, provides that "if upon any point the provisions

of the Revised Statutes are not in effect the same as those of the repealed Act and parts of Acts for which they are substituted," then the provisions of the Revised Statutes shall prevail. But the first part of the section provides that "the said Revised Statutes shall not be held to operate as new laws but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted;" and we must be sure, therefore, before we act on the direction in sub-sec. 2 that the provision in the Revised Statutes is not in effect the same as it was before the revision. Now, the words "unless otherwise ordered" may be read as applying only to the direction as to the place of trial, and some of the provisions in the following sections seem to indicate that it is to this direction only that they do apply. And there being a doubt as to their application, it is certainly permissible to look at the repealed provisions for assistance in resolving the doubt; and when we find, as we do, that in the repealed Act the words "unless otherwise ordered" clearly referred only to the place of trial, I do not think it is permissible to take the view that the provision in the Revised Statutes is not in effect the same as it was before, but we should rather give the doubtful expression the application it had in the enactment previous to the revision.

That the words "unless otherwise ordered" applied originally only to the place of trial seems to be very clear. In sec. 152 of The County Courts Act, 1887, it was provided that the affidavit "shall be entered and filed with the clerk of the court in which the writ is to issue (which said court is to be within the judicial division in which the property to be replevied is situated,"); and afterwards by 54 Vict., ch. 2, sec. 18, it was provided that the

section should be amended by "inserting after the word 'situated,' in the sixth line thereof, the words 'and in which the action shall be tried, unless otherwise ordered;'" and as long as this sec. 152 remained in force there could be no doubt but that it was the place of trial only that could be changed. In carrying sec. 152 into the Revised Statutes the amendment was, of course, incorporated, but the comma that there was after the word "situated" has been omitted; but in my opinion the provision is still the same in effect as it was before.

Mr. Patterson advanced the argument that, even if the writ had been issued without authority, it was the duty of the bailiff to execute it, and that the writ protected him, and that the prisoners would still be guilty of the offences under the Code if they obstructed or resisted the execution of the writ. The cases, however, which he cited in this connection, *Parsons v. Lloyd*, 2 Wm. Bl. 845, and *Collett v. Foster*, 2 H. & N. 360, shew only that where process had been issued in a superior court and is afterwards set aside for irregularity, the writ would afford justification in an action of trespass to the officers who executed it, though not to the party who issued it. But it would not follow, even if the principle of these cases applied to the present one, that because the writ might protect the bailiff in an action against him for trespass the defendants would be guilty of the criminal offence if they resisted the execution of the writ. And the principle of these cases, even as far as it goes, does not apply to the present case, for the reason that no intendment can be made in favour of the jurisdiction of an inferior court. The jurisdiction of the county court is created by The County Courts Act, and the court can act only within the limits of the jurisdiction the Act confers. In *Morse v. James*, Willes 122, the chief justice, speaking of the jurisdiction



of inferior courts, said: "Though an officer may justify under an erroneous process, yet he cannot unless it appears it was a cause in which the court had jurisdiction. As, for example, it has always been holden that a constable can only justify under a justice's warrant in a matter wherein the justice had jurisdiction, though the warrant be never so faulty, but that if a justice of the peace make a warrant to a constable to arrest a man in an action of debt, such a warrant will not justify the constable because he was not obliged to obey it and must take notice at his peril that it was a matter concerning which the justice had no jurisdiction."

I think it must be held that the County Court of Winnipeg had no jurisdiction to issue the writ, and that, as the bailiff had no lawful authority to seize the horses, it cannot be considered that the defendants obstructed him in the execution of his duty or resisted him in the lawful execution of process. I think the first and second questions should be answered in the negative, and that the conviction of the defendants should be set aside.

RICHARDS, J., concurred with BAIN, J.

DUBUC, J., (dissenting.)—

The question to be determined is whether the bailiff had proper authority, under the writ of replevin issued out of the Judicial Division of Winnipeg and placed in his hands, to replevy the horses in question in the Judicial Division of West Selkirk.

By sec. 74 of The County Courts Act, R.S.M. ch. 33, the judge has general power, upon what shall appear to him sufficient grounds, to order a suit to be brought in any other judicial division within his district or jurisdiction than the one in which the cause of action arose or the

defendant or one of the defendants resides or carries on business, or he may order a suit already brought in one judicial division to be removed or heard in any other judicial division.

In sec. 204, applying to replevin, it is stated that the court out of which the writ is to issue "is to be the one for the judicial division in which the property to be replevied is situated and in which the action shall be tried, unless otherwise ordered."

In this case an order was made by the County Court Judge of the Judicial Division of Winnipeg authorizing the replevying of the horses in the Judicial Division of West Selkirk. It is contended on behalf of the defendants that the judge had no authority to make such order, that the same was void, and therefore the bailiff had no authority to seize the horses. The grounds urged in support of that proposition are that the judge is given power to order a suit to be brought or, when brought, to be removed or heard in any other judicial division than the one where it ought otherwise to be brought or heard; but that he has no authority to order a process issued out of one division to be executed in some other judicial division: and it is claimed that the words, "unless otherwise ordered" in sec. 204, apply only to the phrase which immediately precedes it, viz., "and in which the action shall be tried," and not to the whole sentence. But the reading of the whole sentence seems to repel that construction. There is a comma before the words "unless otherwise ordered," and there is none between the two members of the preceding sentence. As it is, I think the words "unless otherwise ordered" must be held to apply to the whole provision. This, in view of the general powers given to the judge by sec. 74 appears to me to be the true and correct interpretation. And in my

opinion the general power given to the judge, upon what shall appear to him to be sufficient grounds, to order a suit to be brought or, when brought, to be removed or heard in any judicial division within his district, includes the lesser power of ordering a process to be executed in any other judicial division than the one out of which the process has issued.

By so holding, the whole question submitted is disposed of. But another point was raised at the hearing which may also be adverted to. It was argued that, the judge's order authorizing the replevin of the horses in the Judicial Division of West Selkirk having improperly been made, the bailiff had no authority to seize the horses and the accused could not be held guilty of resisting or obstructing a public officer in the execution of his duty.

That point seems to have been settled long ago. An officer who properly executes a writ issued in due legal form, although afterwards declared void, is protected against the consequence resulting from such execution. The person injured has his remedy against the party who sets the law in motion, but the officer is protected.

In *Parsons v. Lloyd*, 2 Wm. Bl. 845, the writ of *capias* under which the plaintiff was arrested was declared absolutely void. De Grey, C.J., said: "The cause is out of court. If the defendant is injured, he is entitled to a remedy somewhere; but not against the sheriff or his officer, who are bound to obey the writ issued under the sanction of the court. The officer not being liable, the plaintiff must be."

The same was held by the same judge in *Barker v. Braham*, 2 Wm. Bl. 865, where the plaintiff was arrested on a *ca. sa.* illegally taken out. The *ca. sa.* was set aside for irregularity and the plaintiff discharged.

In *Collett v. Foster*, 2 H. & N. 356, the plaintiff was arrested under a ca. sa. The writ was afterwards set aside by order of a judge. Pollock, C.B., said: "The case of *Barker v. Braham* is directly in point, and if I were disposed to differ from the principle there laid down, I should still feel myself bound by that decision." Martin, B., expressed himself as follows: "I am of the same opinion. I believe it has been long settled that, when a defendant has been arrested under a writ of ca. sa. which is afterwards set aside, the sheriff can justify under the writ, but the plaintiff in the suit is responsible in trespass."

In *Andrews v. Marris*, 1 Q.B. 3, the clerk, Marris, issued a precept to Sergeant Whitham to execute against the plaintiff on a judgment of the Commissioners of the Court of Request. The precept had been issued illegally. Denman, C.J., after deciding that the clerk had issued a warrant without any authority, which, therefore, could not protect him, laid down the following doctrine: "The case of defendant Whitham, however, stands on very different grounds. He is the ministerial officer of the Commissioners bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would be something very unreasonable in the law if it placed him in the position of being punished by the court for disobedience and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff or his officer, that the former, to justify his taking body or goods under process, must shew the judgment in pleading, as well as the writ, but for the latter, it is enough to shew the writ only."

In a case in our own court, *Reg. v. Monkman*, 8 M.R. 509, it was held that where a writ is delivered to the sheriff in proper form, and on its face regular, he is bound to execute it, although the writ may be irregular.

In the present case the writ of replevin issued regularly from the Court of the Judicial Division of Winnipeg, but it could not be executed in the Judicial Division of West Selkirk without a judge's order authorizing it to be done. The order was obtained, and both the writ and order appeared, on their face, to be perfectly regular. That was sufficient for the bailiff. It was not for him to go beyond that and determine whether there was jurisdiction in the court or judge to issue such process. He was in the execution of his duty under a writ of replevin regular on its face and properly issued so far as he could ascertain, and the acts of the defendants were unlawful resistance and obstruction to a public officer in the execution of his duty.

In my opinion the questions reserved by the Chief Justice and submitted to the court should be answered in the affirmative.

*Conviction quashed.*

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[VANCOUVER COUNTY COURT, BRITISH  
COLUMBIA.]

BEFORE HIS HONOR W. NORMAN BOLE, COUNTY JUDGE.

THE KING v. LEE HOW.

*Limitation of time for complaint—Crown not expressly named—Nullum tempus, etc.—Provincial revenue tax laws—Summary Convictions Act R.S.B.C. c. 176, s. 11.*

1. A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose.

VANCOUVER, B.C., August 13, 1901.

BOLE, Co. J.—

The appeal in this case is brought from the decision of the magistrate at Steveston, whereby appellant Lee How was ordered to pay \$180 amount of revenue tax. The facts have been agreed on and two objections have been taken against the validity of the order, it being arranged by counsel that if I should decide against the appellant on the first then the second would be fully argued, otherwise that would not be necessary.

The complaint was not made within three months from the time when the matter of complaint arose. Section 11 of the Summary Convictions Act (R.S.B.C. ch. 176) provides as follows: "If no time is specially limited for making any complaint or laying any information in the Act or law relating to the particular case the complaint shall be made and the information shall be laid within three months from the time when the matter of the complaint or information arose."

The question which the court had to decide in *Morris v. Duncan*, 68 L.J.Q.B. 49 under section 11 of Jervis' Act which is similar to section 11 of our Act, save as to the time limit, did not arise here, as admittedly the complaint was not made within three months as required by the statute; and on this point Mr. Taylor for appellant rests his first objection to the jurisdiction of the magistrate, *i.e.* that the complaint was not made in time.

Mr. Bowser, K.C., for the respondent, relies on the maxim "nullum tempus aut locus occurrit Regi" (no time or place affects the King). The decision of the Court of Appeal in *Re Henley & Co.*, 48 L.J. Chy. 147, is thus summarized by Chitty, J., in *Re Oriental Bank Corporation*, 54 L.J. Chy. at 329." It is settled law that on the construction of the Companies Act 1862 the Crown is not bound, not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away." See also *Weymouth (Mayor of) v. Nugent*, 34 L.J.M.C. 81, and the *Magdalen College Case*, 11 Rep. 74 b. I have always understood the law to be that "except where it is expressly named the Crown is not affected by the Statutes of Limitation, and that the old common law maxim "Nullum tempus occurrit Regi" will prevail, and consequently there is no limit to the time for the recovery of Crown debts. In *Mersey Docks v. Cameron*, 11 H.L.C. 443, 508, Lord Cranworth says "The Crown not being named is not bound by the Act." Vide also *ex parte Postmaster-General*, 10 Chy. D. 595. And the same rule applies although in some of the sections of the Act the Crown is expressly named. *Corporation of Yarmouth v. Simmons*, 10 Chy. D. 518, Chitty on Prerogative 383, and *Perry v. Eames*, [1891] 1 Chy. 658, may also be referred to.

I am of opinion for the reasons stated that the proceedings herein were properly instituted, and that the magistrate had jurisdiction to dispose of the complaint. Argument will be heard on the other point raised.

*Direction accordingly.*

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., GRAHAM, E.J., AND MEAGHER, J.

**THE KING v. CLEMENTS.**

*Defaulting witness—Refusal of warrant for arrest—Effect on magistrate's jurisdiction—Right of accused to make full answer and defence—Discretion to refuse warrant—Habeas corpus—N.S. Liquor License Act.*

1. The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest, is not reviewable upon habeas corpus, although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest.
2. Per Meagher, J.—The erroneous refusal of a magistrate to grant a warrant for the arrest of a defaulting witness will not deprive him of jurisdiction to convict, and the defendant's remedy is by way of appeal only.
3. *Seemle*, per Meagher, J., that the magistrate has a discretion to refuse to issue a warrant for a witness in proceedings under the N.S. Liquor License Act, although the witness has been duly summoned and has failed to appear.

ARGUED: April 12th, 1901.

DECIDED: April 27th, 1901.

The defendant, May Clements, was, on the 8th day of April, convicted before the stipendiary magistrate of the City of Halifax, for a violation of the Liquor License Act (sec. 86, ch. 100, Revised Statutes, 1900) on an information



charging her for that she "on the 20th day of March, A.D. 1901, at the City of Halifax aforesaid did unlawfully sell liquor therein by retail without the license therefor by law required," and was adjudged for her said offence to forfeit and pay a penalty of \$50.00 and costs and in default of payment forthwith was ordered to be imprisoned in the city prison at Halifax at hard labour for the term of 60 days unless said fine and costs were sooner paid.

On the trial before the convicting magistrate after the prosecution had closed its case, the defendant called and examined several witnesses on her behalf who were regularly and duly summoned by the magistrate at her request, it appearing to him that they were within the Province and likely to give material evidence for the defendant. Among the witnesses summoned for her was a man by the name of John MacDonald, who, the defendant swore, could corroborate her and her witnesses to the effect that she sold no liquor as charged and that the liquor found in her house belonged to him, the said MacDonald. MacDonald was a member of the Baden-Powell constabulary, then in the City of Halifax en route to South Africa, and did not appear in answer to the summons. After due service of it on him had been duly proved to the satisfaction of the magistrate, the defendant's counsel asked for a warrant, under sec. 23, ch. 161, Revised Statutes, 1900, and tendered the fees therefor to the magistrate to bring MacDonald before him to so testify on behalf of the defendant.

The magistrate refused the application, basing his decision on the ground that it was not shown to him on oath that witness fees were paid or tendered to MacDonald concurrently with or after the service on him of the summons, and at the request of the prisoner's counsel made an entry in his proceedings of his decision in the following words "Service on a former day of a summons to witness

John MacDonald without tendering witness fees to him being established on oath and fees for a warrant were tendered to me. I decline to grant a warrant for arrest of the witness as no fees were tendered or paid. I still refuse to give warrant for same reason." Shortly afterwards, but before conviction, MacDonald left Halifax permanently with his company for South Africa. The defendant was thus unable to procure MacDonald's testimony on her behalf and so lost the benefit of it, as he would not appear voluntarily to be examined as a witness, nor would the magistrate grant process to compel him to be brought before him to testify on behalf of the defendant. She was compelled to close her case accordingly.

The prosecution gave evidence in rebuttal after which the magistrate made the conviction above referred to.

The prisoner was arrested and imprisoned under a warrant issued on said conviction, and on the 10th day of April, 1901, on her application, an order in the nature of a writ of habeas corpus and a certiorari in aid thereto was granted by the learned Chief Justice in Chambers under ch. 181 Revised Statutes, 1900, to discharge her from custody on the ground that the magistrate, by his refusal to grant a warrant for the witness MacDonald, which he was bound to do without payment of the witness fees to the witness, and thus permit the defendant to avail herself of his testimony, did not give the defendant an opportunity of rebutting the case for the prosecution, nor admit her to make her full answer and defence thereto contrary to secs. 122 and 28 of chs. 100 and 161 respectively of the Revised Statutes, 1900, and in consequence his further proceedings in the matter were either without or in excess of jurisdiction. On the return of the habeas corpus and of the proceedings before the magistrate which were brought up in aid, verifying the above facts, the learned Chief Justice

referred the matter to the Court in banco under sec. 25 of ch. 155 Revised Statutes, 1900, "The Nova Scotia Judicature Act," having great doubts as to how the application should be disposed of.

HALIFAX, April, 13, 1901.

*J. J. Power*, for the defendant prisoner: The offence is created by Rev. Stat. N.S., 1900, vol. 2, page 110, sec. 86.

The right of the prisoner to make a full defence is guaranteed to her by the Bill of Rights, which is perpetuated in Rev. Stat. N.S., vol. 2, page 615, sec. 28 (1); and the allowance of such right is a condition precedent to a valid conviction, vol. 2, page 119, sec. 122. We were not legally obliged to pay or tender witness fees to MacDonald.

The warrant should have issued as asked for.

"May" in sec. 23, page 614, vol. 2, R.S.N.S., is imperative notwithstanding interpretation clause, which is only declaratory. *Fenson v. New Westminster*, 2 Can. Cr. Cas., 52; Maxwell, 3rd Ed., p. 335; *R. v. Adamson*, 1 Q.B.D., 201, Endlich, pp. 421, 423, 425; Rev. Stat., vol. 1, page 6, sub-s. 11; *Trenton v. Dyer*, 21 A.R. (Ont.) 379, 24 S.C.R. 474; *R. v. Buchanan*, 1 Can. Cr. Cas. 447.

Criminal procedure is imperative. *R. v. Salter*, 20 N.S.R. 210.

The refusal to issue the warrant is a denial of the right to make the defence and the magistrate's act after that is in excess of jurisdiction. *Re Holland*, 37 U.C.Q.B. 216-217; *R. v. Washington*, 46 U.C.Q.B. pp. 232, 233; *Ex parte Legere*, 27 N.B.R. 292; *Ex parte Flannigan*, 2 Can. Cr. Cas., page 516; *R. v. Roddy v. Hart*, 41 U.C.Q.B. 297; *R. v. Grant*, 30 N.S.R. 374; *Ex parte Doherty*, 33 N.B.R. 15.

No one contra.

HALIFAX, April 27, 1901.

WEATHERBE, J. (dissenting).—

In this criminal prosecution defendant having summoned a witness without paying him fees the witness did not appear.

Application was made to the stipendiary magistrate who tried the case for a warrant under the statute but the magistrate refused to grant the warrant on the ground that no fees had in the first instance been tendered to the witness. The magistrate after such refusal heard witness in rebuttal and convicted the prisoner. It is not, I understand, disputed that the witness was not justified in disobeying the summons for his attendance as a witness. The affidavits before us show, and the convicting magistrate's notes are to the same effect, that the sole ground of the refusal of the magistrate to issue the warrant to bring the witness before him were that no fees had been paid.

The statute, I think, imperatively required the magistrate to issue the warrant and having refused to do so he had, I think, no power to convict. Authorities, if authorities were necessary, are clear upon the subject.

GRAHAM, E.J.—

The following provision in respect to witness fees is found in the chapter on costs and fees, "Fees to be taken under the Liquor License Act," "Witness fees the same as in the Supreme Court."

Nothing is said as to whether or not the fees are to be tendered to the witness with the summons. In the provision in respect to witnesses in civil cases this is expressed.

In this case the defendant did not tender fees to the witness with the summons.

And it is stated in ch. 1 Cr. Law, 613, that in the case of misdemeanors (in respect to which there were no statutes providing for the witness obtaining payment of fees upon petitioning the judge as in case of felonies) that "the party desiring the attendance of the witness must take care and tender sufficient to cover their reasonable expense or the Court will not punish the witness for his non-attendance."

The witness in this case does not come within the provision of the statute R.S. 1900, c. 186, s. 8, providing for the payment of witnesses for the Crown by the municipalities. It is therefore not at all clear, as was contended, that in a case under the Liquor License Act the witness is obliged to attend, or the party entitled to a warrant, unless the witness has first been paid.

The question was decided by the stipendiary magistrate. It was a question which was open to debate. And even if he decided the same erroneously his decision is not to be reviewed in this court by habeas corpus proceedings.

I think the application should be dismissed.

MEAGHER, J.—

A witness named MacDonald was summoned to appear and give evidence on behalf of the defendant upon her trial below.

He failed to do so, and thereupon an application was made to the Stipendiary for a warrant to compel his attendance, which was refused on the ground that the witness fees were not paid. The trial resulted in defendant's conviction for a violation of "The Liquor License Act." She was committed to gaol under a warrant upon the conviction and now seeks her discharge upon the habeas corpus.

The contention on her behalf is that the Stipendiary was bound to grant the warrant; that his refusal was erroneous and based upon untenable ground.

I shall assume that the magistrate's conclusion was erroneous. I do so for present purposes only, and not because I think the law is so. I do not wish to be understood as giving an opinion one way or the other, but may say that my inclination is to hold that he has a discretion in the matter, and, although the reason for his conclusion may not have been sound, other sufficient reasons may have existed which justified the refusal of the application.

It can readily be seen that if the magistrate is bound to issue a warrant in every instance, and for every witness who fails to yield obedience to a summons to appear and testify, the defendant is possessed of a powerful weapon by which he may effectually delay the trial, and especially so if he summons a party who colludes with him and agrees not to appear upon the summons. The defendant, I take it, was examined upon the trial on her own behalf; if not, it was her own fault.

The counsel admitted upon the arguments that a witness named Slade was examined for the defendant whose testimony covered the same facts as MacDonald's would have if called.

In this view the defendant appears to have had a pretty full trial. But, assuming everything in the defendant's favour, I cannot agree that the Stipendiary lost jurisdiction to convict merely because of his erroneous refusal to grant the warrant applied for.

If what he did could be said to be malversation or to have been contrary to natural justice, such as refusal to hear the defendant and her witnesses, the Court possesses the power, notwithstanding the wide language of the statute limiting it, to interfere and revise his actions, if

refusal to hear the defence after hearing the prosecution has been refused, the same as if the case had not been heard at all. And a conviction under such circumstances, where the law imposed the obligation upon the justice of hearing the defence, has been regarded as if made without jurisdiction.

There is not even a suggestion of malversation here, and I am unable to conclude that what he did was necessarily opposed to natural justice. Her counsel stated that her defence was that the liquor in question was MacDonald's, and not hers. I assume that she so testified and that Slade corroborated her as to that.

If, however, any wrong or injustice was done to her by the decision refusing the warrant, she had a remedy by appeal to the County Court Judge and thence to this Court. If the magistrate lost jurisdiction, that is, the power to hear and determine the matter of the information by an erroneous decision on an interlocutory step in the proceedings, it is, I think, reasonable to say he lost it for ever so far as the present proceedings are concerned, and consequently could not make an effective determination of it one way or the other. His adjudication of dismissal would be without jurisdiction in that view, just as much as his conviction: see the observation of Lord Denman in *Reg. v. Bolton* (1841), 1 Q.B. at 74. Moreover, if after the refusal to grant the warrant the defendant had another witness present to establish her defence, the magistrate, if he lost jurisdiction, would not have the power to receive his testimony and upon it make a valid adjudication of dismissal. He would not in the same view have power even to swear the witness.

In *Rex v. Justices of Carnarvon* (1820), 4 B. and Ald. 86, the Sessions upon an appeal against an order of removal refused after hearing the appellant's case to hear

the respondent's witnesses and made an order quashing the order of removal. A mandamus to compel them to rehear the appeal was applied for and was refused, the Court being of the opinion that it had no jurisdiction to interfere, and no right to review the refusal to hear the defendant's witnesses, inasmuch as it was only authorized to review the decisions of the Sessions upon a case sent up by the Sessions for the opinion of the Court. The Sessions in that case applies here.

In *The Queen v. Sheffield, etc., Ry. Co.* (1839), 11 A. & E. 194, it was held that a certiorari would not lie to remove an inquisition (to determine the value of property) taken before two persons by whom the jury and witnesses were sworn appointed *pro hac vice* by the sheriff, but not being any of the persons specially named in the Act for that purpose. The error was held to be one of irregularity only and not of jurisdiction.

Coleridge, J., on p. 201, said:—"In this case extrinsic evidence was offered to show a want of jurisdiction, but in fact it shows that there was jurisdiction and that the proceeding was properly originated. A subsequent act irregularly done in the case of the proceedings was not enough to destroy the jurisdiction. If it were, then the examination of a single witness without swearing him would be sufficient to vitiate the inquisition."

So here the proceeding was originated, and the error, if any, occurred in the course of the exercise by the magistrate of his undoubted jurisdiction, and therefore, in my judgment, the objection goes merely to the regularity of the proceedings and not to the jurisdiction.

I may, in this connection, refer to *The Queen v. Rood* (1895), 28 N.S.R. 159; *The Queen v. Walsh* (1897), 29 N.S.R. 521; *The Queen v. Stevens* (1898), 31 N.S.R. 124, and *Re Consumers' Cordage Company* (1894), 27 N.S.R.



317; *Re D. C. Ferguson* (1892), 24 N.S.R. 106, and especially the paragraph quoted from the judgment of Lord Denman in *Brenan's Case*, 10 Q.B. 502, and the cases of *Re Sproule* (1886), 12 Can. S.C.R. 140, and *In re Trepanier* (1885), 12 Can. S.C.R. 113. Our power to interfere upon the habeas corpus is limited to the same extent as certiorari. Sir William Ritchie, C.J., in the *Trepanier Case*, after referring to *Cave v. Mountain*, 1 M. and G. 257, said:—"and this was a proceeding on certiorari—a fortiori on habeas corpus." In *Ex parte Hopgood* (1850), 15 Q.B. 121, Lord Campbell, C.J., said:—"The certiorari is taken away so that we cannot interfere unless they have acted altogether without jurisdiction."

In *Ex parte Park*, 93 U.S. 18, it was held that "where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from this Court, it will not on habeas corpus review the legality of the proceedings. It is only when proceedings below are entirely void for want of jurisdiction or other cause that such relief will be given."

Whether a matter for which a party is convicted in the District Court is or is not a crime against the laws of the United States is a question within the jurisdiction of that Court which it must decide. Its decision will not be reviewed here by habeas corpus. The court may err, but it has jurisdiction of the question."

In *Ex parte Siebold*, 100 U.S. 371, the Court, after stating that the jurisdiction of the United States Supreme Court when not restrained by some special law extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause or whose proceedings are otherwise void, and such a case occurs when the proceedings are had under an unconstitutional Act, said:—"But where the Court

below has jurisdiction of the cause and the matter charged is indictable under a constitutional law, any error committed by the inferior Court can only be relieved by writ of error, and of course cannot be reviewed at all if no writ of error lies."

Bradley, J., in the case just mentioned at p. 375, said:—"It (the writ of habeas corpus) cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is that he is instantly remanded.

The only ground on which a Court, except where enabled to do so by some special statute, will give relief on habeas corpus to a prisoner under conviction and sentence of another Court, is the want of jurisdiction in such Court over the person, or the cause, or such other matter, rendering its proceedings void.

*The King v. Suddis* (1801), 1 East 306, was a case of habeas corpus to inquire into the validity of a judgment of a court martial. Lord Kenyon, C.J., in giving judgment, said:—"We are not now sitting as a Court of error to review the regularity of the proceedings, nor are we to hunt after possible objections." In *Ex parte Wilson*, 114 U.S. 417, it was said:—"this Court cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that Court, or there is no authority to hold the prisoner under the sentence."

This Court's situation in relation to the Magistrate's Court and the defendant is the same as that stated in the concluding part of the foregoing quotation.

The American as well as the English cases distinguish clearly between the invasion of a constitutional right such as that of trial by jury for example, or the right to be heard in answer to the charge, or the invasion of an immunity, such as the right not to be put in jeopardy twice, or an erroneous assumption of jurisdiction on the one hand,—and an erroneous construction of a statute, the improper reception of evidence, misdirection of the jury, an incorrect ruling upon a demurrer, or an irregular or erroneous step in the proceedings,—on the other hand.

In the latter class of cases the acts of the Court are voidable by appeal or writ of error, while in the former its acts are void because they go to the power of the court itself and not merely to the regularity of the proceedings.

Brown, on Jurisdiction, pp. 240 to 251:—"It is the want of power to hear and determine which renders a judgment void, and not error or irregularity in the exercise of a power which the Court possesses. Brown, on jurisdiction, at p. 256, after referring to a case where the Court below had no jurisdiction at all, said:—"If, however, the Court misconstrues the statute thereby, rendering him liable when he should not be, such misconstruction is mere error of law, and can only be rectified by appeal." Here was at most but a misconstruction of the statute in the present instance, a part of the statute, too, which had no connection with the defence because it related merely to a matter of procedure in the case. The decision referred to by the writer in question was a much stronger case than this because there it was by a misconstruction the party was adjudged guilty when he ought not to have been.

Habeas corpus is not the equivalent of an appeal, writ of error or certiorari, but under it a want of jurisdiction to review the judgment may be shown, and thus the judgment may be defeated. Marshall, C.J., in *Ex parte*

*Walkins* (1830), 3 Peters 203, said:—"An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the Court has general jurisdiction of the subject although it should be erroneous." Here the magistrate had general jurisdiction over the subject of his charge, and where that is so the general rule is that his judgments are not nullities, and consequently habeas corpus is not an appropriate remedy.

The motion should be refused.

*Prisoner remanded.*

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## [COURT OF QUEEN'S BENCH, QUEBEC.]

(APPEAL SIDE.)

## DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDER LACOSTE, C.J., BLANCHET, WÜRTELE AND OUMET, JJ., AND WHITE, JUDGE *ad hoc*.

## THE QUEEN v. DUPONT.

*Assaulting officer in execution of his duty—Description of offence—Plea of guilty to assault on an "acting detective"—Limit of sentence—Reducing illegal sentence on case reserved—Cr. Code, secs. 242, 243, 743, 746 (c).*

1. To justify a sentence of more than three years' imprisonment for assault and wounding a public officer, the charge must allege that the offence was committed while the officer was engaged in the execution of his duty (Code sec. 243).
2. A mere description of the assaulted party in the information as an acting detective does not justify a sentence of seven years on a plea of guilty, nor does it imply that the assault took place while the officer was engaged in the execution of his duty.
3. The Court of Appeal hearing a case reserved as to the validity of the sentence has power under Cr. Code sec. 746 (c) to correct the erroneous sentence, and should in such case reduce the same to the limit of three years provided by Code sec. 242.

MONTREAL, May 23, 1900.

The judgment of the Court was delivered by

WÜRTELE, J.—

In this affair a reserved case has been submitted to the Court of Appeal, by His Honour M. C. Desnoyers, one of the judges of the Sessions of the Peace, for the opinion and action of the court on the sentence rendered by him upon the prisoner Felix Dupont.

On the 27th December, 1898, an information was laid by Ferdinand Guerin against the prisoner Felix Dupont, charging him with having unlawfully wounded Acting

Detective Alfred Riopel, on the day on which the information was laid, by striking him on his head and on his face with a knife and inflicting grievous bodily harm upon him. The information was laid under sec. 242 of the Criminal Code, which makes the offence set up an indictable one, punishable by three years' imprisonment, and the case was tried before His Honour M. C. Desnoyers under Part LIV. of the Criminal Code relating to Speedy Trials of Indictable Offences. The accused pleaded guilty, and was sentenced to an imprisonment in the penitentiary for seven years.

The next section of the Criminal Code, being sec. 243, makes the wounding of a public officer while engaged in the execution of his duty an indictable offence punishable by fourteen years' imprisonment.

As Alfred Riopel was stated in the information to be an acting detective and therefore a public officer, the judge of the Sessions sentenced the accused on his plea of guilty on the 12th January, 1899, to seven years' imprisonment in the penitentiary at St. Vincent de Paul.

The accused was charged with wounding Alfred Riopel, who was a public officer, but he was not charged with having done so while the person whom he so wounded was engaged in the execution of his duty as such public officer. The accused pleaded guilty to the general charge of having wounded a person and not to a special charge of having wounded a public officer while engaged in the execution of his duty.

The judge of the sessions, however, seems to have thought that as the person who had been wounded was a public officer the case fell under sec. 243, and he therefore sentenced the accused to an imprisonment of seven years, and he now submits on the reserved case the following question for the opinion and action of the Court of Appeal:—

“Is the sentence of an imprisonment of seven years under sec. 243 of the Criminal Code the one which should have been rendered, seeing that the information and the charge preferred against the prisoner do not allege that the public officer who was wounded was ‘engaged in the execution of his duty,’ or should it have been rendered under sec. 242 which fixes the maximum of the punishment at an imprisonment of three years?”

We are of opinion that the information and charge were laid under sec. 242, that the prisoner was tried on and pleaded guilty to a charge under that section, and that the punishment could only be the punishment imposed by that section, and that the prisoner should not, therefore, have been sentenced for a term exceeding three years.

Upon the hearing of an appeal under a reserved case, the Court of Appeal under sec. 746 § (c), of the Criminal Code, has the right and power, if it considers the sentence which was rendered in the case to be erroneous, to pass such a sentence as ought to have been passed. Under this authority the Court of Our Lady the Queen now sitting, declares that the sentence to an imprisonment of seven years rendered on the 12th January, 1899, to be erroneous and improper, and correcting such sentence, reduces the imprisonment to three years, and now passing the sentence which the judge of the sessions ought to have passed:—The court sentences Felix Dupont to be imprisoned in the St. Vincent de Paul Penitentiary and there kept at hard labour during the term of three years to be computed from the 12th day of January, 1899.

*Sentence reduced.*

## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE THE FULL COURT.

**Ex parte MICHAUD.***Disqualification of Justice—Inspector—Bias—Interest—N. B. Liquor License Act, 1896.*

1. The fact that a convicting justice for an offence against the provisions of the Liquor License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him.

ARGUED: November 4, 1896.

DECIDED: November 13, 1896.

THE applicant was convicted before justices Murray and Bassett, two justices of the peace in and for the County of Restigouche, for selling liquor contrary to the provisions of The Liquor License Act, 1896, Acts of Assembly (N.B.) 59 Vict. ch. 5. On October 23rd, 1896, Mr. Justice Barker made an order nisi for certiorari to remove the conviction into this Court, with a view of quashing the same, on the following grounds: 1. That justice Bassett was not competent to sit, being a license inspector under the said Act for the district of the County of Restigouche: He was not an inspector for the Town of Campbellton, where the offence was alleged to have been committed, that being, for the purposes of the Act, a separate district. 2. There was no proof of a sale of liquor made by the applicant or his wife, by any person in his employ, or an occupant of his house.

November 4, 1896. *McLatchey* shewed cause. Bassett not being an inspector for the district of Campbellton could have no interest and no cause for bias: *Regina v. Rand*, L.R. 1 Q.B. 230; *Regina v. Grimmer*, 25 N.B. 424; *Regina v. Simmons*, 1 Pugs. 158; *Ex parte Grieves*, 29 N.B. 543; *Regina v. Pettitmangin*, 9 L.T. 683.



*Mott* supported the rule. Interest however infinitesimal disqualifies: Liquor License Act, 1896, sec. 37, sub-sec. 4. If any likelihood of bias the Court will quash the conviction: *Regina v. Steele*, 26 Ont. 540; *Regina v. Justices of Great Yarmouth*, 8 Q.B.D. 525; *Regina v. Justices of Suffolk*, 16 Jur. 612; *Regina v. Justices of Surrey*, 1 Jur. N.S. 1138; *Regina v. Meyer*, 1 Q.B.D. 173.

FREDERICTON, November 13, 1896.

The judgment of the Court was delivered by

VANWART, J.—

An order nisi for a certiorari was granted by Mr. Justice Barker, October 23rd, 1896, returnable in Michaelmas Term, to remove into this Court a conviction made by and before justices Murray and Bassett against Joseph Michaud, September 24th, 1896, for unlawfully selling liquor without the license by law required. The offence was committed in the Town of Campbellton, Restigouche county. By the Liquor License Act, 1896 (59 Vict., ch. 5), the Town of Campbellton is made, for license purposes, a district separate from that part of the county outside of the town.

Section 4 of the Act provides for a Board of License commissioners; section 5 makes provision for the appointment of an inspector of licenses for each district; section 37 makes provision for a separate license fund for each district, the first charge upon which shall be the expenses of the license commissioners, and the second charge the salary and expenses of the inspector.

Bassett was the license inspector for the District of Restigouche county and resided in the district. He was not the inspector for the Town of Campbellton district.

The order was obtained on two grounds :

1. That justice Bassett being an inspector was disqualified by law, through interest, from trying a complaint, and that he was biased.

2. That there was no evidence of sale.

The only ground of bias alleged was that the fact of his being an inspector in one district would make him predisposed to convict, and that his mind would be prejudiced against the accused. There was nothing in the affidavits shewing, or even insinuating, that the justice had not acted with perfect impartiality on the trial of the complaint.

It was argued that inasmuch as the fines and penalties imposed in the district formed a part of the district license fund, the inspector would be interested in having the fund as large as possible. But counsel failed to shew in what way the justice could, under any circumstances, have any interest in the license fund of the "Town of Campbellton District," to which fund the fine imposed in this case would be paid. I fail to discover any disqualification in the justice either on the ground of interest or bias.

Counsel did not seriously contend that there was not ample evidence to warrant the justices in making the conviction.

I think the order nisi should be discharged.

*Order discharged.*

[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE THE COURT EN BANC.

THE QUEEN v. COLLYNS.

*Theft—Cattle frauds—Obliteration of brands—Evidence of similar criminal Acts—Admissibility—Cr. Code, secs. 305, 331.*

1. Evidence of other similar criminal acts may be relevant in a charge of theft if it bears upon the question whether the taking was designed or accidental.
2. Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it *tends* to shew that the accused had been so guilty.

ARGUED: February 11, 1898.

DECIDED: February 11, 1898.

THE defendant and one Gervais were charged with stealing two steers, the property of one Knox. These animals, according to the evidence, had originally been branded with Knox's brand, these brands had been almost wholly obliterated by other brands and marks being placed upon them, and after such obliteration the steers were claimed by Collins as his property. The following evidence was then received, subject to objection on the part of the accused, namely:—

That the brands upon certain cattle, other than those in question, and some of which were the brands of Knox, had been wholly or partially obliterated in the same manner, and that the substituted brands upon such other cattle, as well as those upon the cattle in question, had been made either with branding irons in the possession of accused and used by them in branding cattle owned by them or in their charge, or with similar branding irons.

Gervais was acquitted and the defendant Collyns convicted. The defendant Collyns gave testimony at the trial, and admitted that on one occasion he claimed the cattle in question as his property, but stated that when he did so he was at such a distance from them that he could not see distinctly the brands upon them, and was mistaken by the resemblance.

The only question reserved for the consideration of the Court was whether the evidence so received and objected to was admissible. The objections taken to the admissibility of the testimony were :

1. That the evidence must be confined to the issue, and that the question whether the accused had placed the obliterating brands on the other cattle, or whether such obliterating brands had been put on at all, was not in issue.

2. It was not established that the accused had any connection with the other cattle whose brands had been so obliterated, that such cattle were ever in charge of the accused, or that they ever were in a situation where the accused might have obliterated the brands, or that the accused had any knowledge or notice of the obliteration of those brands.

REGINA, N.W.T., February 11, 1898.

*T. C. Johnstone*, for the Crown.

*P. J. Nolan*, for defendant,

REGINA, N.W.T., February 11, 1898.

The judgment of the majority of the Court was delivered by

WETMORE, J.—

There certainly are cases in which the Crown may adduce evidence tending to shew that the accused has been guilty of criminal acts other than those charged against him, and I am of opinion that in cases where such evidence may be adduced it is not necessary in order to enable its being put in, to establish conclusively, that the accused has been guilty of such other criminal acts. It is sufficient if the evidence tends to shew that the accused has been so guilty.

The law governing the question is laid down in *Makin v. Attorney-General for New South Wales*, [1894] A.C., at p. 65, as follows: "The principles which must govern the decisions of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *Reg. v. Geering*, 18 L.J. (M.C.) 215, the accused was charged with the murder of her husband by administering arsenic to him, and the Crown offered in evidence post mortem analysis of the contents of the stomach, etc., of

the husband and of two sons who had subsequently died, and a medical analysis of the vomit of another son, and also offered evidence that these four persons lived with the prisoner during their lives, and formed part of her family, and that she generally made tea for them and cooked their victuals. This evidence was objected to and received, not because it proved that the sons had been murdered by the prisoner, but merely because it proved that the death of the sons proceeded from the same cause as that of the husband, namely, arsenic, and because it had a tendency to prove that the death of the husband, whether felonious or not, was occasioned by arsenic. In *Regina v. Dossett*, 2 C. & K. 306, the accused was indicted for setting fire to a rick of straw. The rick was set on fire by the prisoner having fired a gun very near to it, and evidence was offered to shew that the rick had been on fire the day previous, and that the prisoner was then close to it with a gun in his hand. There was no other evidence offered to shew that the prisoner had on the day previous fired the gun or set fire to the rick. The evidence, however, was received as tending to shew that the rick was fired at the time charged wilfully.

So in *Regina v. Gray*, 4 F. & F. 1102, the accused was charged with setting fire to his house with intent to defraud an insurance company, and evidence was offered to shew that the prisoner had previously occupied two other houses in succession which had been insured, that fires had broken out in both, and that the prisoner had made claims on the insurance companies for the losses occasioned. There was no other evidence offered to shew that the fires in the two houses had been set by the prisoner, yet the evidence was received as tending to prove that the fire set as charged in the indictment was the result of design, not of accident.

The case now in question was tried by my brother Scott without the intervention of a jury. The learned Judge has not presented to us the full evidence upon which he found the accused Collyns guilty. He has only presented to us so much of the evidence as bears upon the question which he has reserved for the consideration of this Court. We are not at liberty to travel outside the case, in fact, we have not the material before us to enable us to do so. The simple question we have to decide is, was the evidence so received in law admissible? No doubt we ought to assume that the evidence in question influenced the mind of the learned Judge, otherwise he would not have reserved the question, and, therefore, if we reach the conclusion that the evidence was improperly received, we ought to grant a new trial. I am of the opinion, however, that the evidence was properly received, as tending to shew that the obliterating the brands on the animals alleged to have been stolen was deliberately and wilfully done, and that also that it was part of a design on the part of the perpetrator, whoever he may have been, to acquire cattle in the neighbourhood which did not belong to him. To understand this question correctly it may be convenient to discuss what branding means. In this western country, especially in the extreme western part of it, where large herds of cattle are owned by different persons, and allowed to range indiscriminately over the ranches and mix together, the usual indicia of ownership, in order to enable each owner to identify his own cattle, is to brand them. Each owner has his own peculiar and distinctive brand. Now I do not wish to be considered as holding that the mere obliteration of a brand, or the attempt to do so, on an animal and the substitution of another in itself amounts to the theft of an animal. It is not necessary to express any opinion on that question in

this case. I do hold, however, that such obliteration and substitution, coupled with other circumstances, may be strong evidence of theft. Now let me examine what the evidence in this case is, in so far as it is presented to us and bears upon the question submitted to us. It must be borne in mind in the first place that the original brands on these cattle were wholly or partly obliterated, that is, that an attempt has been made to disguise those original brands. But the evidence not only shews this, but it also shews that an attempt had been made from which it may be inferred that the perpetrator intended to substitute some other indicia of ownership. The evidence adduced tended to shew that some person—we will not say at present who—had conceived the general design of disguising the original indicia of ownership and substituting other indicia of ownership as regarded a number of cattle in that part of the country, and the substituted indicia of ownership was all of the same character. The next thing proved is, that two of these animals, with respect to which the original indicia of ownership was substituted, are claimed by the defendant Collyns, and the next circumstance proved is, that the same man has in his possession tools with which the disguising and substitution may be done, and that the marks which are so substituted are the brands or marks by which he identifies his own cattle. Now I have marshalled the evidence in my own way, but I have marshalled it just as the facts presented in the stated case warrant. I am of the opinion that the evidence was properly admitted. With respect to the question of what weight is to be given to the testimony, I express no opinion. That would entirely depend upon other circumstances which are not before us, and with respect to which we have no power to deal. In my opinion the ruling appealed from should be confirmed.



ROULEAU, J. (dissenting).—

The rule is that "no evidence can be admitted which does not tend to prove or disprove the issue joined." Russell on Crimes, at p. 403, explains this rule thus: "In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to shew, on a trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted."

It is exactly what the Crown attempted to do in this case. In order to shew that the prisoner had a disposition to alter brands, the Crown brought witnesses to prove that there were other cattle branded with the prisoner's brand over Knox's brand, without any evidence that the prisoner was ever connected with such illegality. Besides, could the prisoner have any chance to answer such evidence when it was sprung on him during the trial? Is it not reasonable to think that if he had known that the Crown intended to adduce such evidence, he would have been prepared to answer it? It is of common occurrence in the West that fac similies of brands are made by means of a semi-circle and a bar. It is a notorious fact that the Stock Association use such instruments to brand the cattle of members of the Association during the "round up," no

matter what his brand is. Being so, the fact of the prisoner having a brand in his possession similar to that found on some of Knox's cattle is no evidence at all that he is connected with that illegal act. In my estimation all the authorities cited seem to comply strictly with the rule above cited. In the case of *Reg. v. Oddy*, 2 Den. C.C. 269, it was there held that on the trial of an indictment containing counts for stealing, or for receiving the property knowing it to be stolen, evidence of the possession of other property stolen some time before from other persons was not admissible. In my opinion this case is a great deal stronger than the present case, because the prisoner was connected with the facts intended to be proven, while here the prisoner never was connected with the facts proven.

For these reasons I cannot bring my mind to think that this evidence was admissible, and therefore I am of opinion that the learned trial Judge should have refused to admit such evidence.

*Conviction affirmed.*

[IN THE HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J.C.P., MACMAHON AND LOUNT, JJ.

**THE KING v. YOUNG.**

*Defamatory Libel—Conviction—Discharge of accused under Recognizance—Subsequent alleged Libels—Estreat of Recognizance—Order Nisi against defendant to appear for Sentence—Locus Standi of Private Prosecutor—Cr. Code, secs. 302, 971.*

1. Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him.
2. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application.
3. Where fourteen years had elapsed since the conviction, and the only breaches of recognizance charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a locus standi to enforce the recognizance.

ARGUED: May 9, 1901.

DECIDED: July 7, 1901.

THIS was a motion to make absolute an order nisi obtained by Roderick R. McLennan, the private prosecutor herein, calling upon the defendant, Charles W. Young, to shew cause why he should not be ordered to appear at the next sittings of the court of assize, oyer and terminer and general gaol delivery to be holden in and for the united counties of Stormont, Dundas and Glengarry, to receive judgment upon a certain conviction for libel for which he was indicted and tried at the sittings of assizes in and for the said united counties on the 28th day of April, 1887, and thereupon released from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon.

The order nisi was obtained upon the affidavits of the private prosecutor, Roderick R. McLennan and others, charging the defendant with having failed to be of good behaviour since entering into the said recognizance, by reason of his having in a newspaper, of which he was the proprietor and publisher, called "The Cornwall Freeholder," in the years 1891, 1895, 1899 and 1900, published articles alleged to be of a defamatory character of and concerning the said Roderick R. McLennan.

The order made by the late Mr. Justice Rose before whom the defendant was tried and convicted, was that the defendant be released upon entering into his own recognizance and with sureties conditional that he would appear when called upon for sentence.

TORONTO, May 9, 1901.

*A. B. Aylesworth*, K.C., for the motion, cited *Queen v. Beemer* (1888), 15 O.R. 266, on the question of the jurisdiction of the Court, and contended that breach of good behaviour would cover any behaviour analogous to the original offence, such as continuing to libel the prosecutor in the present case.

*E. F. B. Johnston*, K.C., for the defendant, contended that the private prosecutor had no *locus standi* to make this motion, which should be by the Crown.

TORONTO, July 7, 1901.

The judgment of the Court was delivered by MACMAHON, J.—

The English authorities as to the practice on the matter raised by the present motion are very meagre. Before the passing of any rule in England authorizing the Court to

release persons convicted on suspended sentence, it was, where the offence was a slight one, in the discretion of the presiding judge to release the defendant on his own recognizance to appear at any future period when called upon to receive judgment: Archbold's Crown Practice (ed. of 1844), 102.

Where a convicted person was released on bail to appear for sentence when called upon, and it was intended to move for sentence, the recognized practice in England prior to the year 1886 was to serve on the defendant and his bail a notice four days before the motion, and if the defendant did not answer on being called in Court, the recognizance might be estreated, and, upon the estreat of the recognizance a warrant might be obtained for the defendant's apprehension: See *Regina v. Chichester* (1857), 17 Q.B. 504 (note); *R. v. Williams* (1870), 18 W.R. 806; Short & Mellor's Crown Office Practice, p. 231.

The former practice in England is now embodied in Rule 177 of the Crown Office Rules, passed in 1886, and is as follows: "If the defendant be not in custody and be under recognizance to appear to receive sentence, the defendant and his bail may be served with a four days' notice that on a day named therein the Court may be moved for judgment, but service need not be personal": Short & Mellor's Crown Office Practice, p. 538.

The recognizance entered into by the defendant and his sureties is not before us, but the Criminal Code, sec. 971, 55-56 Vict. ch. 29 (D.), provides that having regard to the trivial nature of the offence and any extenuating circumstances, the Court may, instead of sentencing the offender at once to any punishment "direct that he be released on his entering into a recognizance with or without sureties, and during such period as the Court directs, to appear and receive judgment when called upon, and

in the meantime to keep the peace and to be of good behaviour."

Although the usual practice prescribes the service of a notice on the defendant of the intention to move for judgment, that has been sufficiently complied with by the notice of motion served upon the defendant, to shew cause why he should not appear to receive judgment.

When the jury convicted the defendant and the verdict was recorded and the offender was, by order of the Court, released on bail to appear for judgment, it is only upon motion by the Crown in this Province that the recognizance of the defendant and his bail is estreated or that judgment is moved against the offender.

But even had the applicant, Roderick R. McLennan, a *locus standi* to make the motion, fourteen years have elapsed since the conviction of the accused, and the Court is after that lapse of time asked to order the defendant to appear for sentence because it is alleged he has broken a condition of his recognizance by not being of good behaviour in that he has, as alleged, during the time already referred to, defamed the private prosecutor. It may be that the defendant has complete defences to the several alleged charges of libel, and the applicant, Roderick R. McLennan, must be left to his remedy by action or indictment against the defendant in regard to such alleged libellous charges.

The order nisi must be discharged. We think it is not a case for costs.

*Motion refused.*



## APPENDIX.

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### CRIMINAL LAW AMENDMENTS, 1900 and 1901.

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#### CRIMINAL CODE AMENDMENT ACT, 1901.

(Statutes of Canada, 1 Edw. VII., chapter 41.)

*[Assented to May 23, 1901.]*

**H**IS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

**1. Short title.**—This Act may be cited as The Criminal Code Amendment Act, 1901.

**2. 1892, chapter 29 amended.**—The Criminal Code, 1892, is amended in the manner set forth in the following schedule :—

#### SCHEDULE.

**Section 205. Lotteries.**—By substituting for subsection 6 thereof, as enacted by chapter 46 of the statutes of 1900, the following :—

**“ 6.** This section does not apply to—

(a.) the division by lot or chance of any property by joint tenants, or tenants in common, or persons having joint interests (*droits indivis*) in any such property ; or—

(b.) raffles for prizes of small value at any bazaar held



for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve, or other chief officer, of the city, town or other municipality, wherein such bazaar is held, and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars."

331A. By repealing this section, as enacted by chapter 46 of the statutes of 1900, and substituting the following therefor:—

"**331A. Cattle frauds.**—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(a.) without the consent of the owner thereof fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in the taking possession, concealing, appropriating, purchasing or selling of any cattle which are found astray; or

(b.) fraudulently refuses to deliver up any such cattle to the proper owner thereof, or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle; or

(c.) without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle."

707A. By repealing this section, as enacted by chapter 46 of the statutes of 1900, and substituting the following therefor:—

"**707A. Cattle brands as evidence.**—In any criminal prosecution, proceeding or trial, the presence upon the cattle

of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of section 331A respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval."

By inserting the following section immediately after section 714:—

**"714A. Cattle frauds.**—When an offence under section 331 is charged and not proved, but the evidence establishes an offence under section 331A, the accused may be convicted of such latter offence and punished accordingly."

**Section 801. Transmitting depositions.**—By repealing, as of the first day of January, 1901, sub-section 2 of this section as enacted by chapter 46 of the statutes of 1900.

**Section 955. Place of imprisonment.**—By inserting at the end of subsection 2 thereof the following paragraph:—

**"(b.)** In the province of Manitoba any one sentenced to imprisonment for such a term may be sentenced to imprisonment in any one of the common jails in that province unless a special prison is prescribed by law."

**NOTE.**—For the statute of 1900 referred to *supra*, see the Appendix to 3 Can. Cr. Cas. (pages 561-604.)

## THE CANADA EVIDENCE ACT.

Section 5 of the Canada Evidence Act, 1893, as amended by 61 Vict., chapter 53 and 1 Edw. VII., chapter 36 is as follows :—

**5. Incriminating answers.**—No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

2. The proviso to subsection 1 of this section shall in like manner apply to the answer of a witness to any question which pursuant to an enactment of the legislature of a province such witness is compelled to answer after having objected so to do upon any ground mentioned in the said subsection, and which, but for the enactment, he would upon such ground have been excused from answering.

## THE CHINESE IMMIGRATION ACT, 1900.

(Statutes of Canada, 63-64 Vict., chapter 32.)

**19. Penalty for evading.**—Every person of Chinese origin who wilfully evades or attempts to evade any of the provisions of this Act as respects the payment of the tax, by personating any other individual, or who wilfully makes use of any forged or fraudulent certificate to evade the provisions of this Act, and every person who wilfully aids or abets any such person of Chinese origin in any evasion or attempt at evasion of any of the provisions of this Act, is guilty of an indictable offence, and liable to imprisonment for a term not exceeding twelve months, or to a fine not exceeding five hundred dollars, or to both.

**20. Penalty for organizing, etc., unlawful courts.**—Every person who takes part in the organization of any sort of court or tribunal composed of Chinese persons, for the hearing and determination of any offence committed by a Chinese person, or in carrying on any such organization, or who takes part in any of its proceedings, or who gives evidence before any such court or tribunal, or assists in carrying into effect any decision, decree, or order of any such court or tribunal, is guilty of an indictable offence and liable to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred dollars, or to both; but nothing in this section shall be construed to prevent Chinese persons from submitting any differences or disputes to arbitration, provided such submission is not contrary to the laws in force in the province in which such submission is made.

**21. Penalty for molesting officers.**—Every person who molests, persecutes or hinders any officer or person appointed to carry the provisions of this Act into effect is

guilty of an indictable offence, and liable to imprisonment for a term not exceeding twelve months, or to a fine not exceeding five hundred dollars, or to both.

**22. Other Contraventions.**—Every person who violates any provision of this Act for which no special punishment is herein provided, is guilty of an indictable offence, and liable to a fine not exceeding five hundred dollars, or to imprisonment for a term not exceeding twelve months.

**23. Prosecutions.**—All suits or actions for the recovery of taxes or penalties under this Act, and all prosecutions for contraventions of this Act which are not herein declared to be indictable offences, shall be tried before one or more justices of the peace, or before the recorder, police magistrate or stipendiary magistrate having jurisdiction where the cause of action arose or where the offence was committed.

#### ACT RESPECTING THE INCORPORATION OF LIVE STOCK RECORD ASSOCIATIONS.

(Statutes of Canada, 63-64 Vict., chapter 33.)

**13. Signing or presenting false pedigree.**—Any person who signs a false pedigree intended for registration, or who presents or causes another person to present a false pedigree for registration by the Association, shall, upon summary conviction, upon information laid within two years from the commission of the offence, be liable to a penalty not less than one hundred dollars and not exceeding five hundred dollars for each false pedigree so signed or presented, together with the costs of prosecution.

## ACT TO AMEND THE PILOTAGE ACT.

(Statutes of Canada, 63-64 Vict., chapter 36.)

1. **Montreal Pilots' court.**—The Governor in Council may create a pilotage court for the pilotage district of Montreal to be known as "The Montreal Pilots' Court," and hereinafter called "the Court."

2. **Members thereof.**—The court shall consist of a commissioner, who shall be an advocate of the province of Quebec of not less than seven years' standing, and who shall be appointed by the Minister of Marine and Fisheries and sworn in before a judge of the Superior Court of the province of Quebec.

3. **Assessors.**—The Court shall, in the hearing and determination of any charge or complaint against any pilot, and also in any inquiry in connection with any accident or damage happening to or caused by a vessel in charge of any pilot, have power to call in the aid of one or more assessors appointed as hereinafter provided.

4. **How appointed.**—The licensed pilots shall annually, under regulations to be made by the Minister of Marine and Fisheries, appoint one or more qualified pilots to act as such assessors, and the Montreal Pilotage Authority shall also annually select one or more persons qualified to act as such assessors.

5. **Remuneration.**—The commissioner shall be entitled to receive from the person or fund from which the costs of any inquiry or proceedings are directed to be paid, for each day actually occupied in the hearing of any case, the sum of ten dollars, and each assessor acting as such the sum of five dollars for each day so actually occupied; and such remuneration shall be included in and collected as part of such costs.

**6. Montreal Pilotage Authority.**—From and after the creation of the Court and the appointment of the commissioner as hereinabove provided, the power of the Montreal Pilotage Authority to hear any matter which the Court has power to hear and determine shall cease.

**7. Jurisdiction of court.**—The Court shall hear and determine all charges or complaints made against any pilot for any offence committed against the provisions of The Pilotage Act or any regulation thereunder, and which can now be heard and determined by the Pilotage Authority, whether in connection with any accident happening to or caused by vessels in charge of such pilot or otherwise.

**2.** For the purposes of such inquiry and the punishment of any offence or neglect of duty by a pilot proved at such inquiry to the satisfaction of the Court, the Court shall have all the powers at present enjoyed by the Montreal Pilotage Authority under The Pilotage Act.

**3.** The Court may make such order for the payment of the costs of the inquiry by any pilot in fault or by any person making the charge or complaint against any pilot, or out of the funds of the Pilotage Authority for the said district, as the Court deems just.

**8. Jurisdiction.**—The Court shall have jurisdiction and be competent to hear and determine all offences under section 73 of The Pilotage Act.

**10. Decision.**—The decision or order of the Montreal Pilots' Court shall in all cases be deemed to be final and conclusive.

**12. Application of code.**—The provisions of Part LVIII. of The Criminal Code, 1892, shall apply to proceedings under this Act for the recovery of all fines and costs and the enforcement of all penalties imposed under the au-

thority of The Pilotage Act, and the Court shall, for such purposes, have the jurisdiction and powers of a stipendiary or police magistrate.

### ACT TO AMEND THE WEIGHTS AND MEASURES ACT.

(Statutes of Canada, 63-64 Vict., chapter 37.)

**3. Binder twine.**—Upon, or attached to, every ball of binder twine offered for sale there shall be a stamp with the name of the manufacturer or importer, stating the number of feet of twine per pound in such ball.

**2. Every manufacturer or importer who neglects to** comply with the provisions of this section shall, upon summary conviction, be liable to a penalty of not less than twenty-five cents per ball, but no deficiency in the number of feet contained in any ball shall be deemed a contravention of this section unless such deficiency exceeds five per cent. of the length stated upon such stamp.

**3. Any proceedings under this section, shall be taken** within six months from the sale of any such ball.

**4. This section shall come into force on the first day of** October, one thousand nine hundred, and shall apply to all binder twine imported into, or manufactured in, Canada after that day.

NOTE.—See secs. 7, 8 and 9 of the Staple Commodities Act, 1901, post.

### THE MANITOBA GRAIN ACT, 1900.

(Statutes of Canada, 63-64 Vict., chapter 39.)

**2. Application.**—This Act shall apply only to the Inspection District of Manitoba, as defined by chapter 25 of the statutes of 1899.



**13. Penalty for interfering with weighmasters.**—If any person, by himself or by his agent or employee, refuses or prevents a weighmaster or any of his assistants from having access to his scales, in the regular performance of their duties in supervising the weighing of grain in accordance with this Act, he shall, upon summary conviction, be liable to a penalty not exceeding one hundred dollars for each offence, and such penalty shall be paid to the weighmaster for the benefit of the Manitoba Grain Inspection Fund.

**17. Penalty for doing business without license.**—Any person who transacts the business of a public terminal warehouseman without first procuring a license as herein provided, or who continues to transact such business after such license has been revoked (save only that he may be permitted to deliver grain previously stored in such elevator), shall on conviction upon indictment be liable to a penalty not less than fifty dollars nor more than two hundred and fifty dollars for each and every day such business is carried on; and the commissioner may refuse to renew any license or grant a new one to any person whose license has been revoked, within one year from the time when it was revoked.

**32. Penalty for doing business without license.**— Any person who operates a public country elevator or warehouse without first procuring a license as herein provided, or who continues to transact any such business after such license has been revoked (save only that he may be permitted to deliver grain previously stored in such elevator or warehouse), shall on conviction upon indictment be liable to a penalty of not less than ten dollars and not more than fifty dollars for each and every day such business is carried on; and the commissioner may refuse to renew any license or grant a new one to any person whose

license has been revoked, within one year from the time it was revoked.

**54. Fraud in Weighing.**—(2) The wilful falsification or misstatement of the weight of grain as weighed, and the use of concealed or other weights in such a way as to falsify or change the apparent weights of grain being weighed, shall be offences punishable with fine upon the guilty party, or loss of license, or both.

**56. Manipulation of Grain with intent to deceive.**—Any person offering for sale or storage grain, the different qualities of which have been wilfully manipulated with intent to deceive the person to whom it is so offered for sale or the person or persons receiving it for warehouseing, as to the true quality of such grain, shall be guilty of an offence.

**57. Penalties.**—Any person guilty of an offence specified in this Act or guilty of violating any provision of this Act for which a specific penalty is not herein provided, shall, on summary conviction, be liable to a fine of not less than ten dollars and not more than one thousand dollars.

THE TICKET OF LEAVE AMENDMENT ACT, 1900.  
(Statutes of Canada, 63-64 Vict., chapter 48.)

**1. Convicts in jails.**—The provisions of chapter 49 of the statutes of 1899, intituled An Act to provide for the conditional liberation of Penitentiary Convicts, shall apply to all persons convicted of any offence and being under sentence of imprisonment in any jail or other public or reformatory prison; and the Governor General may grant to any person so convicted and being under imprisonment in any jail or other public or reformatory prison a license to be at large in Canada upon the like terms and conditions as are by the said Act prescribed and authorized with respect to penitentiary convicts.

2. The said Act and this Act may be cited respectively as The Ticket of Leave Act, 1899, and The Ticket of Leave Amendment Act, 1900, and may be cited collectively as The Ticket of Leave Acts.

NOTE.—For The Ticket of Leave Act, 1899, see Appendix to Vol. 2 Can. Cr. Cas. (pages 606-612.)

ACT TO AMEND THE ACT TO RESTRICT THE  
IMPORTATION AND EMPLOYMENT OF  
ALIENS, 1901.

(Statutes of Canada, 1 Edw. VII., chapter 13.)

1. 1897, chapter 11, new section 3.—Section 3 of chapter 11 of the statutes of 1897 is repealed, and the following is substituted therefor :—

“ 3. **Penalty.**—For every violation of any of the provisions of section 1 of this Act, the person, partnership, company or corporation violating it by knowingly assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service of any kind under contract or agreement, express or implied, parole or special, with such alien or foreigner, previous to his becoming a resident in or a citizen of Canada, shall forfeit and pay a sum not exceeding one thousand dollars, nor less than fifty dollars.

“ 2. The sum so forfeited may, with the written consent of any judge of the court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action therefor in any court of competent jurisdiction in which debts of like amount are now recovered.

“ 3. Such sum may also, with the written consent, to be obtained ex parte, of the Attorney General of the province in which the prosecution is had, or of a judge of

a superior or county court, be recovered upon summary conviction before any judge of a county court (being a justice of the peace), or any judge of the sessions of the peace, recorder, police magistrate, or stipendiary magistrate, or any functionary, tribunal, or person invested, by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or its jurisdiction.

"4. The sum recovered shall be paid the Minister of Finance and Receiver General.

"5. Separate proceedings may be instituted for each alien or foreigner who is a party to such contract or agreement."

#### ACT RESPECTING THE PACKING AND SALE OF CERTAIN STAPLE COMMODITIES, 1901.

(Statutes of Canada, 1 Edw. VII., chapter 26.)

[*Assented to May 23, 1901.*]

**H**IS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts and declares as follows :—

**1. Bushel of certain articles.**—In contracts for the sale and delivery of any of the undermentioned articles, the bushel shall be determined by weighing, unless a bushel by measure is specially agreed upon, and the weight equivalent to a bushel shall be as follows :—

Barley, forty-eight pounds ;  
Beans, sixty pounds ;  
Beets, sixty pounds ;  
Bituminous coal, seventy pounds ;  
Blue-grass seed, fourteen pounds ;  
Buckwheat, forty-eight pounds ;

Carrots, sixty pounds ;  
Castor beans, forty pounds ;  
Clover seed, sixty pounds ;  
Flax' seed, fifty-six pounds ;  
Hemp seed, forty-four pounds ;  
Indian corn, fifty-six pounds ;  
Lime, seventy pounds ;  
Malt, thirty-six pounds ;  
Oats, thirty-four pounds ;  
Onions, fifty pounds ;  
Parsnips, sixty pounds ;  
Peas, sixty pounds ;  
Potatoes, sixty pounds ;  
Rye, fifty-six pounds ;  
Timothy seed, forty-eight pounds ;  
Turnips, sixty pounds ;  
Wheat, sixty pounds ;

2. In the province of Quebec, when potatoes are sold or offered for sale by the bag, the bag shall contain at least eighty pounds.

3. Every person who violates any provision of this section shall be liable, on summary conviction, for a first offence, to a penalty not exceeding twenty-five dollars, and for each subsequent offence, to a penalty not exceeding fifty dollars.

**2. Standard in Quebec.**—In the province of Quebec the following shall be the standard weights for hay and straw, unless sold by the ton, or unless it appears that the parties to the contract agreed otherwise :—

A bundle of timothy, clover or other hay, with a timothy band, fifteen pounds ;

A bundle of timothy, clover or other hay, bound with a withe, sixteen pounds ;

A bundle of straw, twelve pounds.

**3. Contents of barrel.**—Every barrel of salt packed in bulk, sold or offered for sale, shall contain two hundred and eighty pounds of salt, and every barrel or sack of salt, sold or offered for sale, shall have the correct gross weight thereof, and in the case of a barrel the net weight also, marked upon it in a plain and permanent manner.

2. When bags of salt are packed in barrels, the number of bags contained in the barrel and the weight of the aggregate amount of salt shall be marked, stamped or branded on one head of the barrel.

3. The name or the registered trade mark of the packer of the salt, if it is packed in Canada, or the name and address of the importer, if it is packed elsewhere than in Canada, shall be marked, stamped or branded on every barrel or sack of salt sold or offered for sale in Canada.

4. Every person who neglects to comply with any provision of this section, and every person who sells or offers for sale any salt in contravention of this section shall be liable, on summary conviction, to a penalty of not less than ten dollars for each offence; but no deficiency in the weight of the salt contained in any package shall be deemed a contravention of this section unless such deficiency exceeds five per cent.

5. No penalty shall be recoverable under this section unless proceedings for the recovery thereof are instituted within twenty days after delivery of the package of salt with respect to which it is claimed that a contravention of this section has been committed.

**4. Apple packing.**—All apples packed in Canada for export for sale by the barrel in closed barrels shall be packed in good and strong barrels of seasoned wood having dimensions not less than the following, namely: twenty-six inches and one-fourth between the heads,

inside measure, and a head diameter of seventeen inches, and a middle diameter of eighteen inches and one-half, representing as nearly as possible ninety-six quarts.

2. When apples, pears or quinces are sold by the barrel, as a measure of capacity, such barrel shall not be of lesser dimensions than those specified in this section.

3. Every person who offers or exposes for sale, or who packs for exportation, apples, pears or quinces by the barrel, otherwise than in accordance with the foregoing provisions of this section, shall be liable, on summary conviction, to a penalty of twenty-five cents for each barrel of apples, pears or quinces so offered or exposed for sale or packed.

**5. Berry and currant boxes.**—Every box of berries or currants offered for sale, and every berry box manufactured and offered for sale in Canada, shall be plainly marked on the side of the box, in black letters at least half an inch square, with the word "Short," unless it contains when level-full as nearly exactly as practicable—

(a.) at least four-fifths of a quart, or

(b.) two-fifths of a quart.

2. Every basket of fruit offered for sale in Canada, unless stamped on the side plainly in black letters at least three-quarters of an inch deep and wide, with the word "Quart" in full, preceded with the minimum number of quarts, omitting fractions, which the basket will hold when level-full, shall contain, when level-full, one or other of the following quantities:—

(a.) fifteen quarts or more;

(b.) eleven quarts, and be five and three-quarter inches deep, perpendicularly, inside measurement, as nearly exactly as practicable;

(c.) six and two-thirds quarts, and be four and five-eighths inches deep, perpendicularly, inside measurement, as nearly exactly as practicable; or

(d.) two and two-fifths quarts, as nearly exactly as practicable.

3. Every person who neglects to comply with any provision of this section, and any person who sells or offers for sale any fruit or berry boxes in contravention of this section, shall be liable, on summary conviction, to a fine of not less than twenty-five cents for each basket or box so sold or offered for sale.

4. This section shall come into effect on the first day of February, one thousand nine hundred and two.

6. **Standard dozen of eggs.**—When eggs are described as sold by the standard dozen, the dozen shall mean one pound and a half.

7. **Binder twine.**—Upon, or attached to, every ball of binder twine offered for sale there shall be a stamp with the name of the manufacturer or importer, stating the number of feet of twine per pound in such ball.

2. Every manufacturer or importer who neglects to comply with the provisions of this section shall, on summary conviction, be liable to a penalty of not less than twenty-five cents per ball; and every manufacturer or importer of binder twine which is not of the length per pound which is stamped upon the ball, shall, on summary conviction, be liable to a penalty of not less than one dollar and not more than twenty-five dollars per ball, and all such twine deficient in quantity shall be confiscated to the Crown: Provided that no deficiency in the number of feet contained in any ball shall be deemed a contravention of this section unless such deficiency exceeds five per cent. of the length stated upon such stamp.



3. Any proceedings under this section shall be taken within six months from the sale of any such ball.

4. This section shall apply to all binder twine imported into, or manufactured in, Canada after the first day of October, one thousand nine hundred.

8. **Administration of Act.**—The Governor in Council may assign the administration of this Act to such member of the King's Privy Council for Canada as he thinks fit, and may make such regulations as he deems necessary for the proper working of this Act.

9. **Repeal.**—The following Acts and parts of Acts are repealed:—Section 17 of The Weights and Measures Act, chapter 104 of the Revised Statutes, and also the following amendments to the said Act, namely, chapter 25 of the statutes of 1888; section 2 of chapter 30 of the statutes of 1898; section 1 of chapter 28 of the statutes of 1899; and chapter 37 of the statutes of 1900. (*ante*, p. 577.)

### THE FRUIT MARKS ACT, 1901.

(Statutes of Canada, 1 Edw. VII., chapter 27.)

7. **Fraud in packing.**—No person shall sell, or offer, expose or have in his possession for sale, any fruit packed in any package in which the faced or shown surface gives a false representation of the contents of such package; and it shall be considered a false representation when more than fifteen per cent. of such fruit is substantially smaller in size than, or inferior in grade to, or different in variety from, the faced or shown surface of such package.

8. **Penalty.**—Every person who, by himself or through the agency of another person, violates any of the provisions of this Act shall, for each offence, upon summary conviction, be liable to a fine not exceeding one dollar and

not less than twenty-five cents for each package which is packed, sold, offered, exposed or had in possession for sale contrary to the provisions of this Act, together with the costs of prosecution; and in default of payment of such fine and costs, shall be liable to imprisonment, with or without hard labour, for a term not exceeding one month, unless such fine and costs of enforcing it are sooner paid.

**13. Procedure.**—In any complaint, information or conviction under this Act, the matter complained of may be declared, and shall be held to have arisen, within the meaning of Part LVIII. of The Criminal Code, 1892, at the place where the fruit was packed, sold, offered, exposed or had in possession for sale.

**14. Appeal.**—No appeal shall lie from any conviction under this Act except to a superior, county, circuit or district court, or the court of the sessions of the peace having jurisdiction where the conviction was had; and such appeal shall be brought, notice of appeal in writing given, recognizance entered into, or deposit made within ten days after the date of the conviction; and such trial shall be heard, tried, adjudicated upon and decided, without the intervention of a jury, at such time and place as the court or judge hearing the trial appoints, within thirty days from the date of conviction, unless the said court or judge extends the time for hearing and decision beyond such thirty days; and in all other respects not provided for in this Act the procedure under Part LVIII. of The Criminal Code, 1892, shall, so far as applicable, apply.

**15. Application of penalties.**—Any pecuniary penalty imposed under this Act shall, when recovered, be payable one-half to the informant or complainant and the other half to His Majesty.



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Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence.

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A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under section 201, paragraphs (a) and (b), of the Code, nor as accessory under section 61.

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Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. CANADIAN SOCIETY v. LAUZON, (QUE.), 354

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Code sec. 883, which authorizes the Court on hearing an appeal from a summary conviction or order of a justice, to try the case upon its merits and to make a new conviction or order, applies to an appeal by the prosecutor from the justice's order dismissing the complaint. Where an order is made allowing the prosecutor's appeal and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default.

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A notice of appeal from a summary conviction is invalid if not addressed to any person. It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given.

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An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and Code sec. 881, constituting such court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is *intra vires* of the Dominion Parliament. A statutory provision that the appellate court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the court.

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Where an appeal to a Court of General Sessions of the Peace from a summary conviction is not proceeded with, an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed *nunc pro tunc* at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Where an appeal from a summary conviction has been heard and determined and a minute made by the chairman of the Sessions dismissing the same with costs and directing the clerk to tax the same, but no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the Court of General Sessions directing a distress for the costs taxed are irregular, and will be quashed. Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation.

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Where an information is laid in the name of an individual describing himself as an agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge. The notice of appeal must in such case be taken

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in the name of the agent personally, otherwise it may be quashed. Where a notice of appeal under the summary convictions clauses is served on the justice who tried the case, instead of on the respondent, it must shew on its face that it is so served on the justice for the respondent.

CANADIAN SOCIETY v. LAUZON, (QUE.) 354

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A magistrate trying a charge of theft of goods of the value of less than \$10 under the summary trials procedure (Code sec. 783 and 786) with the consent of the accused, is not a "court or judge having jurisdiction in criminal cases" within Code sec. 742 allowing an appeal by way of case reserved. *Semble*, the proper mode of review of any question of law involved on such a trial is by way of "stated case" under Code sec. 900.

R. v. HAWES, (N.S.) 529

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On an appeal from a conviction under the Nova Scotia Liquor License Act, the case is to be tried de novo, and the judge is at liberty to pronounce a new finding upon the facts, whether or not new evidence has been taken before him.

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EX PARTE GIBERSON, (N.B.) 577

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To justify a sentence of more than three years' imprisonment for assault and wounding a public officer, the charge must



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R. v. DUPONT, (QUE.) 566

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**Attempt**

*Verdict for, on evidence of principal offence.*

Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilt of the attempt only, will not be set aside although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence.

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R. v. GARNEAU, (QUE.) 69

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**Carnally knowing girl under fourteen**

*Power to convict for indecent assault.*

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**Carnally knowing girl under fourteen—*Cont.***

marily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as the Court of General Sessions would have upon a trial under an indictment. An acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. *R. v. CAMERON, (ONT.)* 385

**Canada Temperance Act***Dismissal—Trial de novo on appeal—Costs.*

Code section 883 which authorizes the Court on hearing an appeal from a summary conviction or order of a justice, to try the case upon its merits and to make a new conviction or order, applies to an appeal by the prosecutor from the justice's order dismissing the complaint. Where an order is made allowing the prosecutor's appeal and convicting the accused of an offence against the Act the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default. *R. v. HAWBOLT, (N.S.)* 229

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The Liquor License Act of Nova Scotia, 1895, sec. 117, applies to prohibit the granting of a certiorari in respect of *any* conviction thereunder unless the applicant makes an affidavit negating the charge as laid in the information; and without such affidavit the Court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions,

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EX PARTE HEBERT, (N.B.) 153

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If on the return to a certiorari the Court is satisfied upon a perusal of the depositions that an offence of the nature described in the summary conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions, and may vary, confirm, reverse or modify the decision of the justice. Where the original conviction directed payment of a fine and the levy of same by distress and in default of sufficient distress adjudged imprisonment, the Court exercising the power of amendment conferred by Code secs. 883 and 889 may substitute in lieu of the distress, etc., an award of imprisonment forthwith in case of non-payment of the fine. The Court has power to so amend a summary conviction returned on certiorari whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus.

R. v. MURDOCK, (ONT.) 82

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Where the question of motive is an important element in the case, and the motive charged depends on the alleged improper relations of the accused with a certain female, evidence is admissible to prove such relations, although it tends to shew that he is of bad character, and notwithstanding the general rule which prevents the prosecution from adducing evidence of the general bad character of the accused as a circumstance in proof of the charge. Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge.

R. v. BARSALOU (No. 2), (QUE.) 347

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Statutes of Canada, 1 Edw. VII. c. 41.

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R. v. BARSALOU (No. 3), (QUE.) 446

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of favour, or by reason of menaces or under terror, is inadmissible in evidence. The Indian Agent, appointed under the Indian Act, R.S.C. 1886, c. 43, for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it. The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown. *R. v. PAH-OAH-PAH-NE-CAPI (Alias CHARCOAL, an Indian),*

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An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and Code sec. 881, constituting such Court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is intra vires of the Dominion Parliament. A statutory provision that the appellate Court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the Court. *R. v. MALLOY, (ONT.)* 116

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*BRAULT v. ST. JEAN-BAPTISTE ASSOCIATION OF MONTREAL,*

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*R. v. LIGHTBURNE, (ONT.)* 358*Sunday observance law.*

The selling of cigars on Sunday may be prohibited either directly by a provincial legislature or by municipal by-laws authorized by such legislature; and in either case such restriction is of a merely local nature, and is to be classed as

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a police or municipal regulation and not as a matter essentially appertaining to the "criminal law," and so within the sole competence of the Parliament of Canada. The New Brunswick statute to prevent the profanation of the Lord's Day, 62 Vict., c. 11, is *intra vires* of the provincial legislature.

RE GREENE, (N.B.) 182

**Contract of sale**

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A transfer of both the possession and the right of property in goods under an agreement with the buyer to purchase them back from him at an increased price within a limited time, is not a transaction of "pawn, pledge or exchange for the repayment of money lent," and is not subject to the provisions of the Pawnbrokers Act of Ontario.

R. v. MUNSON, (ONT.) 351

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Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence.

R. v. WHIFFIN, (N.W.T.) 141

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Where there is nothing upon the face of a conviction for keeping a house of ill-fame to shew whether the police magistrate who tried the case acted under the "summary trials" clause of the Code, by virtue of which he has an absolute jurisdiction in respect of that offence, or simply as a justice of the peace under the "summary convictions" clauses and of Code, secs. 207 and 208, and the conviction is defective in form but is amendable if within the "summary convictions" clauses, and not amendable if under the "summary trials" clauses, the Court will treat it as a "summary conviction" and correct the same under Code, sec. 889, by reducing the term of imprisonment where the sentence is in excess of that authorized by law.

R. v. SPOONER, (ONT.) 209

*By Harbour Commissioners.*

A writ of certiorari may issue from a conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law.

PERRAULT v. MONTREAL HARBOUR COMMISSIONERS, (QUE.) 501

**Conviction—Cont.**

*For practising medicine, must state the particulars.*

A conviction for illegally practising medicine must shew the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought. The conviction must set out the particular acts of the accused which are held to constitute the illegal practising

R. v. WHELAN, (ONT.) 277

**Convicts**

See TICKET OF LEAVE.

**Corporation**

*Neglect of duty causing death.*

Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a good ground for quashing the indictment. As the Criminal Code provides no punishment for the offence, the common law punishment of a fine may be imposed on a corporation indicted under it.

UNION COLLIERY CO. v. R., (CAN.) 400

*Nuisance—Negligence endangering life.*

An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash. The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under the Criminal Code, secs. 191 and 213, for which an indictment will lie.

R. v. TORONTO RAILWAY COMPANY, (ONT.) 4

*Whether liable to summary conviction.*

The procedure of the Criminal Code as to summary convictions does not apply to corporations. A magistrate making a summary conviction and directing a distress to levy the fine imposed, is bound to award imprisonment for want of sufficient distress (Code Forms and Code sec. 982), and the summary convictions procedure is not applicable to corporations,



**Corporation—Cont.**

as a conviction cannot be made in the terms of the Code Forms (Code schedule 1). As regards charges of a criminal nature, a corporation is not within the statutory term "person," which by The Interpretation Act, R.S.C. 1886, ch. 1, is declared to include "any corporation to whom the context can apply," etc.

EX PARTE WOODSTOCK ELECTRIC LIGHT CO., (N.B.) 107

Liability of, to summary conviction; Note.

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**Corroboration**

See EVIDENCE.

**Costs***Costs of conveying to gaol.*

The costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction for a third offence under the Nova Scotia Liquor License Act. Where the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplage, and will invalidate the warrant.

RE J. W. KING, (N.S.) 426

*In certiorari proceedings.*

Where a magistrate returns an amended conviction in certiorari proceedings and the conviction is sustained only by reason of the amendment, costs of the certiorari proceedings should not be awarded against the applicant.

R. v. WHIFFIN, (N.W.T.) 141

*Summary conviction.*

The award of costs under a summary conviction should direct payment thereof to the informant and not to the justice.

R. v. ROCHE, (ONT.) 64

*Time of making order for costs of appeal.*

Where an appeal to a Court of General Sessions of the Peace from a summary conviction is not proceeded with, an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed *nunc pro tunc* at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Where an appeal from a summary conviction has been heard and determined and a minute made by the chairman of the Sessions dismissing the same with costs and

**Costs—Cont.**

directing the clerk to tax the same, but no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the Court of General Sessions directing a distress for the costs taxed are irregular, and will be quashed. Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation.

BOTHWELL v. BURNSIDE, (ONT.) 450

*Including costs of appeal in conviction.*

Where an order is made allowing the prosecutor's appeal from a justice and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default.

R. v. HAWBOLT, (N.S.) 229

**Counterfeiting***Counterfeit coin—Guilty knowledge.*

On a charge of having counterfeit coins in possession, proof that the accused had also in his possession "trade dollars," which, although genuine, were not worth their stamped value, and that he had attempted to put them off as worth their stamped value, is not admissible as shewing intent to put off the counterfeit coin.

R. v. BENHAM, (QUE.) 63

**Criminal Code of Canada**

|            |          |
|------------|----------|
| Section 61 | 170, 510 |
| 138        | 510      |
| 144        | 461, 539 |
| 145        | 330      |
| 146        | 334      |
| 147        | 467      |
| 176        | 69       |
| 191        | 4        |
| 192        | 400      |
| 198        | 494      |
| 198 (2)    | 209      |
| 201        | 170      |
| 205        | 284      |
| 207        | 209      |
| 207 (j)    | 253, 494 |
| 208        | 253, 494 |
| 213        | 4, 400   |

**Criminal Code of Canada—*Cont.***

|             |               |
|-------------|---------------|
| Section 229 | 41            |
| 242         | 566           |
| 243         | 566           |
| 252         | 400           |
| 259         | 385           |
| 261         | 385           |
| 262         | 159           |
| 266         | 421           |
| 269         | 385           |
| 272         | 251           |
| 302         | 580           |
| 305         | 572           |
| 326 (c)     | 259           |
| 331         | 34, 572       |
| 344         | 165           |
| 359         | 219           |
| 396         | 437           |
| 473         | 63            |
| 475         | 63            |
| 511         | 28, 116       |
| 512         | 354           |
| 528         | 251           |
| 539         | 330           |
| 540         | 330           |
| 562         | 107           |
| 562 (2)     | 465           |
| 578         | 510           |
| 586 (c)     | 510           |
| 590         | 145, 410      |
| 594         | 410           |
| 595         | 203, 330      |
| 596         | 145, 410      |
| 602         | 131           |
| 611         | 265, 467      |
| 626         | 173           |
| 629         | 4             |
| 635         | 4             |
| 637         | 107           |
| 638         | 4             |
| 639         | 400           |
| 640         | 146           |
| 641         | 145, 410, 467 |
| 641 (2)     | 203           |
| 651         | 1             |
| 656         | 12            |
| 661         | 446           |
| 667         | 219           |
| 668 (9)     | 219           |
| 684         | 334           |
| 687         | 145           |
| 711         | 101, 219      |
| 713         | 101, 385      |
| 723         | 265           |
| 735         | 219           |

**Criminal Code of Canada—Cont.**

|         |         |                         |
|---------|---------|-------------------------|
| Section | 742     | 259, 529                |
|         | 743     | 193, 566                |
|         | 744     | 41, 251, 259            |
|         | 744 (2) | 323                     |
|         | 746     | 193, 251                |
|         | 746 (c) | 566                     |
|         | 747     | 34, 193                 |
|         | 752     | 165, 430                |
|         | 783     | 165, 529                |
|         | 783 (c) | 159                     |
|         | 783 (e) | 461                     |
|         | 783 (f) | 209, 253, 494           |
|         | 784     | 209                     |
|         | 784 (3) | 461                     |
|         | 785     | 159, 165, 330, 385, 494 |
|         | 785 (3) | 461                     |
|         | 786     | 529                     |
|         | 787     | 165                     |
|         | 788     | 159, 209, 253, 500      |
|         | 791     | 323, 330                |
|         | 797     | 330                     |
|         | 798     | 430                     |
|         | 799     | 330, 385                |
|         | 800     | 165, 430                |
|         | 843     | 465                     |
|         | 853     | 107                     |
|         | 856     | 107                     |
|         | 872     | 82, 305                 |
|         | 879     | 116, 491                |
|         | 880     | 126, 246, 450           |
|         | 880 (b) | 354                     |
|         | 881     | 116                     |
|         | 883     | 82, 416                 |
|         | 884     | 450                     |
|         | 885     | 367                     |
|         | 889     | 82, 141, 165            |
|         | 896     | 209                     |
|         | 897     | 450                     |
|         | 898     | 450                     |
|         | 899     | 367                     |
|         | 900     | 72, 529                 |
|         | 934     | 400                     |
|         | 955     | 430                     |
|         | 955 (7) | 178                     |
|         | 958     | 500                     |
|         | 971     | 580                     |
|         | 982     | 107, 467                |
| Form    | P       | 510                     |
|         | FF      | 467                     |
|         | NNN     | 246, 354                |

**Crown***Limitation of time—Provincial revenue tax laws.*

A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose.

R. v. LEE HOW, (B.C.) 551

**Defamatory libel**

See LIBEL.

**Depositions***Stenographer recording, in magistrate's absence.*

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. Both the commitment for trial and the indictment founded on such illegal depositions are invalid [and should be set aside.

R. v. TRAYNOR, (QUE.) 410

*Manner of taking.*

The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in Criminal Code, secs. 590 and 687, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanor while testifying. When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to

**Depositions—Cont.**

cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by-law. Where the depositions before the magistrate have not been taken according to law, and a material provision of the law has not been complied with, the indictment may be quashed under Criminal Code, sec. 641 upon motion at any time before the accused is given in charge to the jury.

R. v. LEPINE, (QUE.) 145

Code Amendment of 1901 (sec. 801).

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**Description of offence**

*Sufficiency of count—Reasonable information of the charge.*

A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury, and the act charged was sufficiently identified in the count, without mention of the jury, to cure the defect under Code sec. 611.

R. v. THOMPSON, (N.W.T.) 265

**Disorderly house**

*Unlawfully "appearing the keeper."*

A plea of guilty to a charge heard before a city police magistrate, that the accused did, "unlawfully appear the keeper of a house of ill-fame" is sufficient to justify a conviction for the offence of keeping a house of ill-fame, because by Cr. Code, sec. 198 (2), any one who appears mistress or as the person having the care or management of any disorderly house shall be deemed to be the keeper thereof, and is punishable as such, although not the real owner or keeper thereof. *Semle*, upon indictment under Cr. Code, sec. 198, the offence of keeping a common bawdy-house is punishable in Ontario by a sentence to the "Mercer Reformatory" for any term less than two years under sec. 34 of the Public Prisons Act, R.S.C. c. 183, which section remains unpealed by the Code.

R. v. SPOONER, (ONT.) 209

*Form of information—Consent to summary trial.*

An information charging the accused, for that she was "the keeper of a disorderly house, that is to say, a common bawdy house," must be taken to be a charge under Code, sec. 198, for the indictable offence of keeping a common bawdy house, and is not cognizable under the special jurisdiction given to magistrates by Code sec. 783 (f), because not laid in the

**Disorderly house—Cont.**

exact language of the latter section. Such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under Code, sec. 785 (amendment of 1900). To give jurisdiction to a justice to punish on summary conviction the keeper of a disorderly house under the vagrancy clauses of the Code (secs. 207 and 208), the information must charge that the accused is a loose, idle or disorderly person or vagrant (sec. 208), and it is not sufficient to charge simply that the person is a keeper of a disorderly house, although that fact constitutes the person a loose, idle or disorderly person or vagrant, by virtue of Code sec. 207. A conviction for that the accused was on April 21 "and on divers other days and times during the month of April" the keeper of a disorderly house, based upon an information in like terms laid on April 29, is bad, because it may be read as inclusive of an offence committed subsequently to the laying of the information, and including the date of the conviction, as to which the prisoner was not charged on her trial before the convicting magistrate.

R. v. KEEPING, (N.S.) 494

Keeping house of ill-fame; Evidence; Note. 216

Bawdy house cases; Keeper, inmate or frequenter; Note. 498

**Disqualification of magistrate***Disqualification of, for bias.*

The disqualification of a justice arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied.

EX PARTE RYAN, (N.B.) 485

*Pecuniary interest—Salary fund.*

A magistrate is not disqualified from trying a case by reason of the fact that his salary is paid out of a municipal fund largely made up of fines imposed for the infraction of the statute under which the charge is laid. A magistrate is not disqualified from trying a case because of his being a ratepayer of the municipality to which, in case of conviction, the fine would be payable.

EX PARTE GORMAN, (N.B.) 305

*Bias—Interest—Action pending.*

A magistrate is disqualified from trying an information for an offence punishable on summary conviction where there is a bona fide action pending against him brought by the husband of the accused for alleged malicious conduct as a judicial officer and for assault. If the action against the

**Disqualification of magistrate—Cont.**

justice is not bona fide but a mere sham to attempt to disqualify him, its pendency will not operate as a disqualification. The principles which govern the challenge of a jurymen for favour are applicable to the disqualification of a justice on the ground of bias. *EX PARTE HANNAH GALLAGHER, (N.B.)* 486

**Bias—Liquor License Inspector.**

The fact that a convicting justice for an offence against the provisions of the Liquor License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him. *EX PARTE MICHAUD, (N.B.)* 569

Pecuniary interest; Note.

322

**Election Laws***Joining several charges of corrupt practices.*

On a proceeding by summons in the nature of a criminal prosecution under the Ontario Elections Act, sec. 188, all corrupt practices charged as having been committed by the accused in respect of the same election may be tried together and included in the one judgment of conviction.

*RE A. E. CROSS, (ONT.)* 173

*Personation—Bail after committal.*

Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow their bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount.

*R. v. STEWART; R. v. STALLAN; R. v. TAYLOR, (MAN.)* 131

**Estreat***Locus standi of private prosecutor*

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application.

*R. v. YOUNG, (ONT.)* 580



## Evidence

### *Theft—Admissibility of similar criminal acts.*

Evidence of other similar criminal acts may be relevant in a charge of theft if it bears upon the question whether the taking was designed or accidental. Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it *tends* to shew that the accused had been so guilty.

R. v. COLLYNS, (N.W.T.) 572

### *Confession—Admissions made to detectives.*

An inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible.

R. v. TODD, (MAN.) 514

### *Appeal for rejection of corroborative evidence.*

Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corroborative only. R. v. BURNS, (No. 1), (ONT.) 323

### *Confession—Admissibility—Onus of proof.*

An admission of guilt made by a party charged with a crime to a person in authority under the inducement of a promise of favour, or by reason of menaces or under terror, is inadmissible in evidence. The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown.

R. v. PAH-CAH-PAH-NE-CAPI, (*alias* CHARCOAL, an Indian), (N.W.T.) 93

### *Meaning of "conclusive" evidence.*

Proof of consumption of liquor in the premises occupied by a society, association or club within the provisions of sec. 53 of the Ontario Liquor License Act, by any member thereof, constitutes incontrovertible evidence of the sale or keeping for sale of such liquor, and the effect of sec. 53, sub-sec. 3, which declares that such proof shall be "conclusive evidence" of sale, and that "any member of the club, etc., shall be taken conclusively to be the person who keeps such liquors for

**Evidence—Cont.**

sale," is to debar any member of the club against whom the charge is laid, from shewing the contrary.

R. v. LIGHTBURNE, (ONT.) 358

*For co-defendant—Use of.*

The evidence adduced by the witnesses called on behalf of any defendant is effective as regards the others, whether beneficially or adversely, and counsel for the other defendants may therefore cross-examine such witnesses before their cross-examination by counsel for the prosecution.

R. v. BARSALOU, (No. 3), (QUE.) 446

*Credence of corporation in false pretence.*

To prove that the board of a corporation had acted on the faith of the false representation made, it is not necessary on a charge of obtaining money from the corporation by false pretences to examine one or more of the directors, if the fact can be proved by other competent witnesses. Evidence is admissible of facts which are subsequent to the false representation, to prove the insolvency of the defendants a very short time after the false representation had been made, as an evidence of their knowledge of its falsity when they made it.

R. v. BOYD, (QUE.) 219

*Of motive—Proof of immoral relationship.*

Where the question of motive is an important element in the case, and the motive charged depends on the alleged improper relations of the accused with a certain female, evidence is admissible to prove such relations, although it tends to shew that he is of bad character, and notwithstanding the general rule which prevents the prosecution from adducing evidence of the general bad character of the accused as a circumstance in proof of the charge. Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge.

R. v. BARSALOU, (No. 2), (QUE.) 347

*Provincial laws of evidence.*

Oral evidence is not admissible to prove relationship on a charge of incest in the province of Quebec, and the relationship must be established by the production of extracts

**Evidence—Cont.**

from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 21, unless the absence of such registers is proved. It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. *R. v. GARNEAU, (QUE.)* 69

*Attempt—Evidence of principal offence.*

Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony and to disbelieve the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence.

*R. v. HAMILTON, (ONT.)* 251

For extradition, see EXTRADITION.

Of theft, see THEFT.

Of rape, see RAPE.

Of counterfeit coin offences, see COUNTERFEITING.

Weight of evidence, see NEW TRIAL; RESERVED CASE.

Confessions, admissibility of; Note. 529

Disorderly house; Keeping house of ill-fame; Note. 216

Incriminating answers; Witness's objection to answer; Note. 269

To prove perjury; Note. 334

Proof of relationship; Registers of marriages, etc., in Quebec Province; Note. 70

Receiving stolen goods; Nature of evidence required; Recent possession; Note. 104

Rules of, in indecent assault cases; Note. 389

**Extradition***Sufficiency of evidence to justify surrender.*

In extradition proceedings the indictment of the accused in the foreign court is hearsay evidence only and is not admissible in evidence in the enquiry before the extradition commissioner. On habeas corpus in respect of an extradition commitment for surrender to the foreign State, the Court

**Extradition—Cont.**

may revise the commissioner's decision on the question of whether or not there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to the sufficiency of the evidence to justify the committal. To justify the committal of an accused person for trial or for extradition it is only necessary that the evidence should be such as gives rise to probable cause to believe him guilty, and it is not necessary that it should be sufficiently conclusive to authorize his conviction if unanswered. Upon either a preliminary enquiry or an examination in extradition proceedings, any reasonable doubt must go in favour of committal and not in favour of discharge.

EX PARTE ISAAC FEINBERG, (QUE.) 270

**False pretences***Obtaining only a credit in account—Attempt.*

On an indictment for the offence of having obtained money by false pretences, the defendants cannot be convicted of the full offence when it is proved that by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen, but they might, if the evidence should establish an attempt to obtain the money, be convicted of such attempt.

R. v. BOYD, (QUE.) 219

**Fine**

See CONVICTION.  
CORPORATION.

**Fortune telling***Deception an essential element.*

Deception is an essential element of the offence of "undertaking to tell fortunes" under sec. 396 of the Criminal Code, and to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

R. v. MARCOTT, (ONT.) 437

**Fraud**

See FALSE PRETENCES.

**Fruit Marks Act 1901**

Statutes of Canada, 1 Edw. VII., c. 27.

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**Gaming***Margin contracts in stocks and merchandise.*

A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under section 201, paragraphs (a) and (b), of the Criminal Code of Canada, nor as accessory under section 61.

R. v. DOWD, (QUE.) 170

**"Giving in charge" to jury***When is an accused "given in charge" to the jury.*

An accused person cannot be said to have been "given in charge" to the jury until the jury are sworn, and his arraignment and the pleading of Not Guilty to the indictment do not constitute a "giving in charge."

R. v. LEPINE, (QUE.) 145

**Grand jury***Practice as to summoning.*

An order of a superior Court to a coroner to summon a grand jury need not shew on its face all the facts which made it necessary that a coroner, instead of the sheriff, should be directed to summon the jury. Where a grand jury has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff. There is at common law inherent power in a superior Court of criminal jurisdiction to order one or more grand juries to be summoned. The sheriff or coroner may be directed by the one order to summon both a grand and a petit jury.

R. v. McGUIRE, (N.B.) 12

**Grievous bodily harm***Maliciously inflicting.*

In order to constitute "grievous bodily harm" it is not necessary that the injury should be either permanent or dangerous; and an injury is within the meaning of the term if it be such as seriously to interfere with comfort or health.

R. v. ARCHIBALD, (ONT.) 159

Aggravated assault; Summary trial; Note.

163

**Habeas corpus***Co-ordinate jurisdiction of Supreme Court.*

Per Sedgewick, J. (S. C. of Canada)—The jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus is not an appellate jurisdiction over provincial courts, nor does it extend further than to give such judge equal and co-ordinate power with a judge of the provincial court.

R. v. PATRICK WHITE, (CAN.) 435

*In aid of certiorari.*

The Court may on certiorari amend a summary conviction under the powers conferred by Code secs. 883 and 889, whether the certiorari is one preliminary to a motion to quash the conviction, or is in aid of a writ of habeas corpus.

R. v. MURDOCK, (ONT. C.A.) 82

*In Nova Scotia—Order of protection to jailer only.*

In discharging a prisoner in habeas corpus proceedings under ch. 181, Revised Statutes of Nova Scotia, an order of protection in respect of a civil action by the prisoner, can be made only in favour of the jailer and not in favour of the magistrate and prosecutor.

R. v. KEEPING, (N.S.) 494

*Following a certiorari.*

Where it appears on the return to a certiorari that the convicted person is in close custody, the Court may order a habeas corpus and hear together the motion to quash the conviction and the motion for the prisoner's discharge.

R. v. SPOONER, (ONT.) 209

*Refusal of warrant for witness.*

The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his Court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest, is not reviewable upon habeas corpus, although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest.

R. v. CLEMENTS, (N.S.) 553

**Habeas corpus—Cont.***Extradition—Limitation of powers of review.*

On habeas corpus in respect of an extradition commitment for surrender to the foreign State, the Court may revise the commissioner's decision on the question of whether or not there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to the sufficiency of the evidence to justify the committal. Upon either a preliminary enquiry or an examination in extradition proceedings, any reasonable doubt must go in favour of committal and not in favour of discharge.

EX PARTE ISAAC FEINBERG, (QUE.) 270

**Harbour commissioners***Certiorari on conviction by,—Proof of by-law.*

A writ of certiorari may issue from a conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law. A copy of by-laws of the Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, *semble*, proof should also be made of approval by the Governor-in-Council and of publication in the *Canada Gazette*. Under the Pilotage Act, R.S.C. ch. 80, and the Montreal Harbor Commissioners' Act, 1894, 57 Vict., ch. 48, the Montreal Harbour Commissioners are authorized to pass a by-law which will make it an offence for a pilot, who is selected for service with one transatlantic line, to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line; but the by-law in question in the present case merely stating that "no pilot making such agreement shall . . . be entitled to any duty as pilot by turn or in rotation," did not actually prohibit the act mentioned.

PERRAULT v. MONTREAL HARBOUR COMMISSIONERS, (QUE.) 501

*Certiorari—Conviction of pilot.*

The appeal to the Quebec Court of Queen's Bench, Crown Side, provided in Cr. Code sec. 879, does not apply to a conviction by the Harbour Commissioners, in their capacity of the pilotage authority, depriving a pilot of his license. Such a conviction is subject, in the Province of Quebec, to proceedings by certiorari to the Superior Court on proof of due cause for evocation.

ARCAND v. MONTREAL HARBOUR COMMISSIONERS, (QUE.) 491  
See PILOT.

**House of ill-fame**

See DISORDERLY HOUSE.

**Housebreaking and theft***Conviction for receiving on trial for,*

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft. R. v. LAMOUREUX, (QUE.) 101

**Imprisonment***Naming place of, in warrant—Costs of conveying.*

A warrant of commitment is bad if it simply directs the gaoler to "imprison" the defendant for the stated time, without specifying the place of imprisonment. The description of the place of imprisonment in a warrant of commitment is sufficient if the prison be described by its situation or some other definite description. The costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction for a third offence under the Nova Scotia Liquor License Act. Where the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant. RE J. W. KING, (N.S.) 426

*For non-payment of fine.*

A magistrate trying a case under the summary convictions clauses may, under Cr. Code, sec. 872, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels. EX PARTE GORMAN, (N.B.) 305

*Revocation of ticket of leave—Term not extended.*

The term of imprisonment in pursuance of any sentence runs from the day of the passing of such sentence, without interruption, except when especially provided otherwise by law. The license issued under the authority of 62-3 Vict., ch. 49, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned. The revocation by the Crown, without cause assigned, of such license works no interruption in the run-



**Imprisonment—Cont.**

ning of the sentence which shall terminate at the same time as if such license had never been granted.

R. v. JOHNSON, (QUE.) 178

*Habeas corpus—Order for further detention.*

Where the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by Cr. Code, sec. 752, of making an order for the further detention of the accused.

R. v. RANDOLPH, (ONT.) 165

In Manitoba, place of; Code Amendment of 1901.

587

**Incest***Proof of relationship.*

Oral evidence is not admissible to prove relationship on a charge of incest in the Province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 21, unless the absence of such registers is proved. It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. R. v. GARNEAU, (QUE.) 69

**Incriminating answers**

Amendment (1901) of sec. 5 of Canada Evidence Act, as to, 588

Note on witness's objection to answer.

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And see CONFESSION.

**Indecent assault***Conviction for, on charge of carnal knowledge.*

The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. An acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence.

R. v. CAMERON, (ONT.) 385

Rules of evidence; Note.

389

**Indian Act***Confession of crime to Indian Agent.*

The Indian Agent, appointed under the Indian Act, R.S.C. 1886, ch. 43, for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it.

R. v. PAH-CAH-PAH-NE-CAPI (*Alias* CHARCOAL, an Indian),  
(N.W.T.) 93

*Power to amend summary conviction returned.*

Where the original conviction directed payment of a fine and the levy of same by distress and in default of sufficient distress adjudged imprisonment, the Court exercising the power of amendment conferred by Code secs. 883 and 889 may substitute in lieu of the distress, etc., an award of imprisonment forthwith in case of non-payment of the fine.

R. v. MURDOCK, (ONT.) 82

**Indictment***Application to court for order to prefer.*

A superior court should not make an order under Crim. Code, sec. 641, that an indictment be preferred against a party accused of an offence if the two justices before whom the preliminary investigation was held signed a declaration to the effect that they were unable to agree. In such a case the prosecutor should be left to his recourse to an application to the Attorney-General, who can either prefer an indictment himself or direct one to be preferred. Whether or not the Crown should assume the expense incidental to a prosecution is more particularly a question for the Attorney-General as a part of his executive functions, and is not one to be decided by a court.

EX PARTE HANNING, (QUE.) 203

*Corporation—Demurrer.*

An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash.

R. v. TORONTO RAILWAY COMPANY, (ONT.) 4

*Form of, for perjury.*

The examples in Code Form FF, of the description of offences in indictments are intended to illustrate the provisions of Code, sec. 611, relating to the form of counts; and the operative effect of Form FF, under Code, sec. 982, is not restricted

**Indictment—Cont.**

to the validating of counts in respect only of the particular offences for which examples are given in the Form, but extends to counts for other offences. On a charge under Code, sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead. An indictment may be valid as being founded on the evidence disclosed on "the depositions taken before the justice" (Code, sec. 641), although the preliminary enquiry was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were given in respect of all of them in the one proceeding.

R. v. SKELTON, (N.W.T.) 467

*Irregularity in depositions—Objection.*

Where the depositions before the magistrate have not been taken according to law, and a material provision of the law has not been complied with, the indictment may be quashed under Crim. Code, sec. 641, upon motion at any time before the accused is given in charge to the jury.

R. v. LEPINE, (QUE.) 145

*Joint indictment—Order of defence.*

Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge. Where there is a difference in degree of criminality with respect to the charge made against several persons jointly indicted, they should be called upon for their defence the greater before the less according to the seriousness of the charge against each as disclosed both by the indictment and the evidence for the prosecution, *ex. gr.*, the principal before the accessory, and the thief before the receiver. Where there appears no such difference in degree of criminality in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment.

R. v. BARSALOU, (No. 3), (QUE.) 446

**Inland revenue***"Manufactured tobacco," meaning of.*

Under sec. 334 of the Inland Revenue Act (Can.) possession of domestic tobacco cut ready for use after purchase in the raw leaf is illegal unless the tobacco is put up in packages and the packages have revenue stamps attached. Such possession is illegal, although the possessor is not a tobacco

**Inland revenue—*Cont.***

manufacturer or trader, and notwithstanding that he purchased same in the raw leaf entirely for his own use, and gave it no other process of "manufacture" than cutting up the raw leaf.

R. v. SENECA, (QUE.) 137

**Insurance Act (Can.)***Provincial insurance company.*

An insurance company incorporated under the provisions of a provincial law is not entitled to carry on a fire insurance business in another province without being registered or licensed under the laws of such other province or of the Dominion of Canada. The person who manages and carries on the business of such unregistered and unlicensed insurance company in a province other than that by which it was incorporated is liable to summary conviction therefor under the provisions of the "Insurance Act" of Canada, R.S.C. 1886, ch. 124, sec. 22. The "Insurance Act" of Canada is *intra vires* of the Parliament of Canada as regards the provisions thereof controlling provincial companies doing business in Canada outside of the limits of the province under the laws of which they were incorporated.

R. v. HOLLAND, (B.C.) 72

**Intent***"Undertaking" to tell fortunes.*

Deception is an essential element of the offence of "undertaking to tell fortunes" under sec. 396 of the Criminal Code, and to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others.

R. v. MARCOTT, (ONT.) 437

*Proof of immoral relationship—Motive.*

Where the question of motive is an important element in the case, and the motive charged depends on the alleged improper relations of the accused with a certain female, evidence is admissible to prove such relations, although it tends to shew that he is of bad character, and notwithstanding the general rule which prevents the prosecution from adducing evidence of the general bad character of the accused as a circumstance in proof of the charge.

R. v. BARSALOU, (No. 2), (QUE.) 347

**Irregular process***Warrant of arrest executed by unqualified person.*

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose. . . EX PARTE GIBERSON, (N.B.) 537  
Cured by appearance; Magistrate's jurisdiction; Note. 539

**Joint indictment**

See INDICTMENT.

**Jurisdiction**

See MAGISTRATE.

DISQUALIFICATION OF MAGISTRATE.

**Jury***Direction to "stand by."*

A direction to a juror to "stand by" at the instance of the Crown is in substance a deferred challenge for cause, and cannot be made after the juror has, by direction of the Clerk of Assize, taken the book to be sworn.

R. v. BARSALOU, (No. 1), (QUE.) 343

*Direction to stand by—Panel once exhausted.*

The Crown has not the right to direct jurors to stand by when they are called a second time, after the panel has been exhausted by challenges and directions to stand by.

R. v. BOYD, (QUE.) 219

*No right to, on appeal to General Sessions.*

An appeal from a summary conviction under the Criminal Code is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury. A statutory provision that the appellate court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the court.

R. v. MALLOY, (ONT.) 116

**Larceny.**

See THEFT.

**Lease***Of premises for illegal purposes.*

Where unlicensed hotel premises are leased by the occupant to another as a mere cover to enable the lessor to continue the business, including the sale of liquors, and the agreement

**Lease—Cont.**

is illegal in purpose and design to the knowledge of both parties, it passes no title, and the lessor who remained in possession of the premises is liable to conviction as an "occupant" thereof within the meaning of the Nova Scotia Liquor License Act, 1895, in respect of an illegal sale of liquor made therein.

R. v. McNUTT, (N.S.) 392

**Libel***Venue—Change of.*

In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs. The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue.

R. v. NICOL, (B.C.) 1

*Discharge under recognizance—Subsequent libels.*

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application. Where fourteen years had elapsed since the conviction, and the only breaches of recognizance charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a locus standi to enforce the recognizance.

R. v. YOUNG, (ONT.) 580

**License**

See LIQUOR LICENSE.

MUNICIPAL BY-LAWS.

**Limitation***Prosecution for corrupt practices.*

A prosecution for corrupt practices in a provincial election is not an "action" for a penalty and is therefore not prescribed in one year under the Ontario Elections Act, sec. 195 (3) or in two years under the Ontario Limitation of Actions Act, R.S.O. ch. 72, sec. 1.

RE A. E. CROSS, (ONT.) 173

**Liquor license***Conviction involving forfeiture of license.*

Where a licensee is convicted under sec. 122 (3) of "The Liquor License Ordinance" (N.W.T.) of supplying liquor to an interdicted person with a knowledge of such interdiction, the effect of such conviction being that his license shall be forfeited, an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction. The giving of a recognizance under Cr. Code, sec. 880, on an appeal from a summary conviction, operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from.

SIMINGTON v. COLBOURNE, (N.W.T.) 367

*Discretion to refuse warrant for witness.*

*Semble*, per Meagher, J., that the magistrate has a discretion to refuse to issue a warrant for a witness in proceedings under the N.S. Liquor License Act, although the witness has been duly summoned and has failed to appear.

R. v. CLEMENTS, (N.S.) 553

*Magistrate a license inspector—Bias—Interest.*

The fact that a convicting justice for an offence against the provisions of the Liquor License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him.

EX PARTE MICHAUD, (N.B.) 569

*Lease of premises for illegal purpose.*

Where unlicensed hotel premises are leased by the occupant to another as a mere cover to enable the lessor to continue the business, including the sale of liquors, and the agreement is illegal in purpose and design to the knowledge of both parties, it passes no title, and the lessor who remained in possession of the premises is liable to conviction as an "occupant" thereof within the meaning of the Nova Scotia Liquor License Act, 1895, in respect of an illegal sale of liquor made therein. On an appeal from a conviction under said Act, the case is to be tried *de novo*, and the judge is at liberty to pronounce a new finding upon the facts, whether or not new evidence has been taken before him.

R. v. McNUTT, (N.S.) 392

*Unincorporated club—Liquors for members only.*

An unlicensed person who, as a member of an unincorporated club, purchases with the funds of the club a supply of in-

**Liquor license—Cont.**

toxicating liquors for the use of the members, each of whom, although at liberty to help himself, was to contribute to the keeping up of the fund in proportion to what he used of the supply, is guilty under the Ontario Liquor License Act of the offence of unlawfully keeping liquor for sale. Proof of the consumption of liquor in the premises occupied by a society, association or club within the provisions of sec. 53 of the Ontario Liquor License Act, by any member thereof, constitutes incontrovertible evidence of the sale or keeping for sale of such liquor, and the effect of sec. 53, sub-sec. 3 which declares that such proof shall be "conclusive evidence" of sale, and that "any member of the club, etc., shall be taken conclusively to be the person who keeps such liquors for sale," is to debar any member of the club against whom the charge is laid, from shewing the contrary. Such enactment is *intra vires* of the Provincial Legislature.

R. v. LIGHTBURN, (ONT.) 358

Clubs; Note.

364

*Statutory restriction of certiorari proceedings.*

The Liquor License Act of Nova Scotia, 1895, sec. 117, applies to prohibit the granting of a certiorari in respect of any conviction thereunder, unless the applicant makes an affidavit negating the charge as laid in the information; and without such affidavit, the Court cannot grant the writ, although the sole questions raised are as to the validity of the License Act as regards wholesale transactions, and as to whether the conviction which shewed the exact quantity of liquor admittedly sold was not a wholesale transaction.

BIGELOW v. R., (CAN.) 337

**Live stock**

Act of 1901 respecting false pedigrees of.

590

**Lotteries***Conspiracy to commit offence:*

Provincial legislatures have no power to authorize the running of lotteries. No action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law. Where in a civil action it appears that the plaintiff entered into a conspiracy with the defendant to commit an unlawful act and that the action is brought to recover money paid in furtherance of such conspiracy, it is the duty of the Court *ex mero motu* to notice the illegality, although not formally



**Lotteries—Cont.**

pleaded. Such an illegality cannot be cured by the defendant's pleas or attempted waiver. Where there are two agreements, both of which are in furtherance of the unlawful scheme, the second being in form a contract of loan but collateral and auxiliary to the first which provides for the operation of the lottery, both agreements are invalid and unenforceable.

BRAULT v. ST. JEAN-BAPTISTE ASSOCIATION OF MONTREAL,

(QUE.) 284

Code Amendment of 1901 (sec. 205).

585

**Magistrate***Calling, as a witness—Refusal of, to be sworn.*

Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony. Where on an application to quash a summary conviction on the ground that the magistrate refused to give evidence on the trial before himself, the Court is satisfied, from the magistrate's affidavit and the evidence taken in the proceeding, that the magistrate was not a material witness and that the application to have him sworn as such was not made bona fide, the conviction should not be disturbed.

EX PARTE HEBERT, (N.B.) 153

*Illegality of arrest as affecting jurisdiction.*

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose.

EX PARTE GIBERSON, (N.B.) 537

*Jurisdiction—Wilful injury to property.*

Under Cr. Code, sec. 511, the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of. The same rule applies to a charge of trespass made under

**Magistrate—Cont.**

R.S.O. 1897, ch. 120, sec. 1, under which the magistrate's jurisdiction is ousted if the accused "acted under a fair and reasonable supposition that he had the right to do the act complained of."

R. v. DAVY, (ONT.) 28

*Jurisdiction of, in case of substitutional service.*

The proof of service of a magistrate's summons served substitutionally must shew that the defendant could not be conveniently served in person, and that the adult person substitutionally served for him at the defendant's place of abode is an inmate thereof. Where proof of the substitutional service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on certiorari.

RE BARRON, (P.E.I.) 465

*Refusal of warrant against defaulting witness.*

The erroneous refusal of a magistrate to grant a warrant for the arrest of a defaulting witness will not deprive him of jurisdiction to convict, and the defendant's remedy is by way of appeal only.

R. v. CLEMENTS, (N.S.) 553

*Summary jurisdiction of, without consent.*

The provisions of Cr. Code 144 fixing the punishment for which anyone guilty of obstructing a police officer shall be liable "on summary conviction" is not controlled by Code secs. 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused. *The Queen v. Crossen*, 3 Can. Cr. Cas. 153 (Man.), disapproved.

R. v. NELSON, (B.C.) 461

*Jurisdiction to try summarily a charge of perjury.*

A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury. Where the offence is one which may be summarily tried by a police magistrate on consent, and the accused has consented and made his defence to the charge and been acquitted, it is no longer competent for the magistrate to turn the proceedings into a preliminary inquiry and to accept the prosecutor's recognizance to prefer an indictment.

R. v. BURNS (No. 2), (ONT.) 330

*Summary trial without consent—Penalty.*

A prosecution before a magistrate for the offence of being an inmate of a house of ill-fame is none the less a "summary trial" proceeding, although the magistrate's jurisdiction is

**Magistrate—Cont.**

absolute and is exercisable without the consent of the accused. The extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV. of the Criminal Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, \$100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded \$50 in addition to six months' imprisonment.

R. v. ROBERTS, (N.S.) 253

*Summary trial—Conviction for lesser offence.*

A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment.

R. v. CAMERON, (ONT.) 385

*Finding on question of fact.*

The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon certiorari, and the same can be attacked only by way of appeal from the conviction.

R. v. URQUHART, (ONT.) 256

Disqualification of, see DISQUALIFICATION OF MAGISTRATE.

Defendant out of jurisdiction; Summary proceedings; Substitutional service; Note.

466

Jurisdiction of; Irregular process cured by appearance; Note.

539

**Manitoba Grain Act, 1900**

Statutes of Canada, 63-64 Vict., ch. 39

**Manslaughter***Corporation—Neglect of duty causing death.*

Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. As the Criminal Code provides no punishment for the offence, the common law punishment of a fine may be imposed on a corporation indicted under it.

UNION COLLIERY CO. v. R., (CAN.) 400

**Medical registration***Practising Medicine.*

Prescribing medicine to one person on one day is not "practising." Evidence of acts of practising, antecedent and subsequent may be given, but they must be approximate in time.

R. v. LEE, (ONT.) 416

*"Practising"—Proving more than a single act.*

A conviction for illegally practising medicine must shew the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought. The conviction must set out the particular acts of the accused which are held to constitute the illegal practising. A conviction stating the offence as having been committed, between dates specified, by prescribing, etc., for "R. and others" will be set aside if the evidence discloses no offence as regards the attendance upon R.; and it cannot be sustained by proof of altogether separate offences shewn to have committed within the stated time as regards other persons. The conviction cannot be amended, on an appeal in which no new evidence is taken, by inserting in lieu of the words "and others" the names of such other persons.

R. v. WHELAN, (ONT.) 277

**Mens rea**

See INTENT.

**Municipal by-law***Police officer prosecuting for benefit of municipality.*

Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation.

BOTHWELL v. BURNSIDE, (ONT.) 450

*Transient traders by-law—Description of offence.*

In order to support a summary conviction under a municipal by-law passed under the transient traders' clauses of the Ontario Municipal Act, R.S.O. 1897, ch. 223, sec. 583 (30-33), the proceeding must shew either that the accused is a transient trader or that he occupied premises in the municipality for a temporary period.

R. v. ROCHE, (ONT.) 64

**Murder***Murder or manslaughter—Provocation.*

Although, by Cr. Code, sec. 229 (3), no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury, and not for the Judge, to determine any preliminary question of fact upon which the alleged legal right depends. Where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose. It is misdirection for the trial Judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is the withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitled the prisoner to a new trial. *R. v. BRENNAN, (ONT.)* 41

Murder or manslaughter; Provocation; Note. 61

And see *CONFESSION*.

**Negligence**

Neglect of duty causing death; Liability of corporation for. 400

**New trial***Conviction against weight of evidence.*

In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is whether or not the verdict is one which the jury, as reasonable men, ought not to have found. A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favours an acquittal.

*R. v. BREWSTER, (N.W.T.)* 34

*Error in law.*

If upon a summary trial for the theft of money, the trial judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for the prisoner to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial.

*R. v. MACCAFFERY, (N.S.)* 193

And see *RESERVED CASE*.

**Notice of appeal**

See APPEAL.

**Nuisance***Consumptive sanitarium.*

The keeping of a house or private hospital for the treatment of consumptive patients is not a business *ejusdem generis* with bone boiling, soap boiling, oil refining, gas manufacturing, or the storing of hides, so as to constitute an "other noxious or offensive trade or business," made an offence against the Public Health Act (Ont.) where done without the consent of the municipality, and this notwithstanding the magistrate's finding that the place is not a sanitarium or hospital in the true sense, but a place of business, and that by reason of the failure to take proper precautions the business had become offensive.

R. v. PLAYTER, (ONT.) 338

*Running street cars without proper fenders.*

The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under the Cr. Code, secs. 191 and 213, for which an indictment will lie.

R. v. TORONTO RAILWAY COMPANY, (ONT.) 4

**Obstructing peace officer***"Summary conviction" or "summary trial."*

The provisions of Cr. Code 144 fixing the punishment for which anyone guilty of obstructing a police officer shall be liable "on summary conviction" is not controlled by Code secs. 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused.

R. v. NELSON, (B.C.) 461

**Packing of staple commodities**

Act of 1901 respecting.

597

**Pawnbroker***Sale with agreement for repurchase.*

A transfer of both the possession and the right of property in goods under an agreement with the buyer to purchase them back from him at an increased price within a limited time, is not a transaction of "pawn, pledge or exchange for the repayment of money lent," and is not subject to the provisions of the Pawnbrokers Act of Ontario. A person

**Pawnbroker—Cont.**

making a business of purchasing goods under a contract whereby he gives to the seller a right of repurchase at an increased price, does not thereby exercise the trade of a pawnbroker. R. v. MUNSON, (ONT.) 351

**Pedigree**

False pedigree of live stock, Act of 1901 respecting. 590

**Perjury**

*False statutory declaration by several declarants.*  
On a charge under Code sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead. The permission granted by the Canada Evidence Act to certain officials to "receive" the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person "authorized by law to make a solemn declaration" (Code sec. 147). A statutory declaration jointly made by several persons and stating the matter declared in the following form, i.e.:—"We know that, etc." is to be construed as a statement by each of the declarants severally, that he knows the matters alleged.

R. v. SKELTON, (N.W.T.) 467

*Jurisdiction to try summarily.*

A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury.

R. v. BURNS, (No. 2), (ONT.) 330

*Misdescription of tribunal before which committed.*

A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury, and the act charged was sufficiently identified in the count, without mention of the jury, to cure the defect under Code, sec. 611.

R. v. THOMPSON, (N.W.T.) 265

Evidence to prove; Note.

334

**Personation***At election—Bail after committal.*

Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow their bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount.

R. v. STEWART; R. v. STALLAN; R. v. TAYLOR, (MAN.) 131

**Pilot***Certiorari—Harbour Commissioners.*

A writ of certiorari may issue from a conviction of a pilot by the Montreal Harbour Commissioners for the violation of a by-law. A pilot, by appearing, pleading, and attending the investigation of a complaint against him, is held to waive irregularities of service, etc., before conviction, which appear on the face of the record. A copy of by-laws of the Harbour Commissioners, certified as a true copy under the hand and seal of the secretary, is sufficient, to the extent it covers; but, *semble*, proof should also be made of approval by the Governor-in-Council and of publication in the *Canada Gazette*. Under the Pilotage Act, R.S.C. ch. 80, and the Montreal Harbour Commissioners' Act 1894, 57 Vict., ch. 48, the Montreal Harbour Commissioners are authorized to pass a by-law which will make it an offence for a pilot, who is selected for service with one transatlantic line, to handle more than thirty vessels of that line during the season, or to take service on any vessel of another line; but the by-law in question in the present case merely stating that "no pilot making such agreement shall . . . be entitled to any duty as pilot by turn or in rotation," did not actually prohibit the act mentioned. The conviction in this case, as signed, was irregular, inasmuch as it imposed an imprisonment of one month unless the costs of distress and commitment were sooner paid, whereas by the judgment of the pilotage committee the only penalty imposed on the petitioner was that he be fined \$20 without costs.

PERRAULT v. MONTREAL HARBOUR COMMISSIONERS, (QUE.) 501

*Conviction of, by Harbour Commissioners.*

The appeal to the Quebec Court of Queen's Bench, Crown Side, provided in Cr. Code, sec. 879, does not apply to a conviction by the Harbour Commissioners, in their capacity of the pilotage authority, depriving a pilot of his license. Such a conviction is subject, in the Province of Quebec, to proceedings by certiorari to the Superior Court on proof of due cause for evocation.

ARCAND v. MONTREAL HARBOUR COMMISSIONERS, (QUE.) 491  
Pilotage Act amendment of 1900. 591

**Police magistrate**

See MAGISTRATE.



**Practising medicine**

See MEDICAL REGISTRATION.

**Preliminary inquiry***Before two justices—Disagreement.*

A superior Court should not make an order under Cr. Code, sec. 641, that an indictment be preferred against a party accused of an offence if the two justices before whom the preliminary investigation was held signed a declaration to the effect that they were unable to agree.

EX PARTE HANNING, (QUE.) 203

*Indictment quashed for invalidity of depositions.*

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. Both the commitment for trial and the indictment founded on such illegal depositions are invalid and should be set aside. R. v. TRAYNOR, (QUE.) 410

*Remand for more than three clear days.*

Where on a preliminary inquiry a remand is desired for a time exceeding three clear days (Code sec. 586 (c)), the justice may remand only by warrant (Code Form P), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient. An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory is void for uncertainty. Such a warrant charges no offence, and neither it nor a remand thereon is validated by Code sec. 578, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary inquiry before the justice.

R. v. HOLLEY, (N.S.) 510

**Prescription***Prosecution for corrupt practices.*

A prosecution for corrupt practices is not an "action" for a penalty and is therefore not prescribed in one year under the Ontario Elections Act, sec. 195 (3), or in two years under the Ontario Limitation of Actions Act, R.S.O. ch. 72, sec. 1.

RE A. E. CROSS, (ONT.) 173

**Private hospital***Noxious and offensive business—Ejusdem generis rule.*

The keeping of a house or private hospital for the treatment of consumptive patients is not a business *ejusdem generis* with bone boiling, soap boiling, oil refining, gas manufacturing, or the storing of hides, so as to constitute an "other noxious or offensive trade or business," made an offence against the Public Health Act (Ont.) where done without the consent of the municipality, and this notwithstanding the magistrate's finding that the place is not a sanitarium or hospital in the true sense, but a place of business, and that by reason of the failure to take proper precautions the business had become offensive.

R. v. PLAYTER, (ONT.) 338

**Private prosecutor***Application for leave to appeal by private prosecutor.*

Leave to appeal to the Court of Appeal under Cr. Code, sec. 744, as amended in 1900, should not be granted to a private prosecutor except under exceptional circumstances. Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corroborative only.

R. v. BURNS (No. 1), (ONT.) 323

*Locus standi of, in proceedings for estreat.*

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application. Where fourteen years had elapsed since the conviction, and the only breaches

**Private prosecutor—Cont.**

of recognizance charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a locus standi to enforce the recognizance. R. v. YOUNG, (ONT.) 580

**Privilege**

See WITNESS.

**Provocation***Excessive force in ejecting.*

Although, by Cr. Code, sec. 229 (3), no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury, and not for the judge, to determine any preliminary question of fact upon which the alleged legal right depends. Where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose. It is misdirection for the trial Judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is the withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitled the prisoner to a new trial.

R. v. BRENNAN, (ONT.) 41

Murder or manslaughter; Provocation; Note.

61

**Public Prisons Act***Section 34 not repealed by Cr. Code.*

*Semble*, upon indictment under Cr. Code, sec. 198, the offence of keeping a common bawdy-house is punishable in Ontario by a sentence to the "Mercer Reformatory" for any term less than two years under sec. 34 of the Public Prisons Act, R.S.C. ch. 183, which section remains unrepealed by the Code.

R. v. SPOONER, (ONT.) 209

**Quebec Province**

Acts of civil status; Proof of relationship; Registers of marriages, etc.; Note.

70

**Rape***Evidence of conduct inconsistent with resistance.*

On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence.

R. v. RIENDEAU, (No. 2), (QUE.) 421

**Receiving stolen goods***Trial for housebreaking and theft.*

In the offence of receiving stolen goods the stolen goods must have been taken and stolen by a person other than the person accused of the receiving. The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft.

R. v. LAMOUREUX, (QUE.) 101

Nature of evidence required; Recent possession as evidence;  
Note.

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**Recognizance***On appeal—Want of affidavit of justification.*

It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given.

CRAIG v. LAMARSH, (N.W.T.) 246

*On appeal from summary conviction—Time.*

The recognizance required by sec. 71 (c) of the B.C. Summary Convictions Act, on an appeal to a County Court from a summary conviction, must be entered into before the appeal is entered for trial; and the giving of the recognizance thereafter, but before the sitting of the Court, is insufficient.

R. v. KING, (B.C.) 128

**Recognizance—Cont.**

*On appeal from summary conviction.*

On an appeal under Cr. Code, sec. 880, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellants, and the appeal will be quashed if the recognizance is given with only one surety.

R. v. JOSEPH, (QUE.) 126

**Relationship**

Proof of; Registers of marriages, etc., in Quebec Province; Acts of civil status; Note.

70

**Reserved case**

*Question of law arising before the trial.*

A reserved case upon an objection taken before pleading, that the charge, upon which the accused was arraigned for a "speedy trial," was not founded upon the evidence adduced at the preliminary enquiry should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction.

R. v. TREPANIER, (QUE.) 259

*Review of question of law on summary trial.*

A magistrate trying a charge of theft of goods of the value of less than \$10 under the summary trials procedure (Code secs. 783 and 786) with the consent of the accused, is not a "Court or judge having jurisdiction in criminal cases" within Code sec. 742 allowing an appeal by way of case reserved.

R. v. HAWES, (N.S.) 529

**Resisting peace officer**

*Bailiff of inferior court enforcing void civil process.*

Where the process of an inferior Court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the Court, such process is insufficient upon which to base a conviction for resisting the officer in its execution.

R. v. FINLAY, (MAN.) 539

**Revenue tax laws**

*Prosecution—Limitation of time—Crown debt.*

A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose.

R. v. LEE HOW, (B.C.) 551

**Sale of goods**

Act of 1901 respecting packing and sale of staple commodities.

597

And see PAWNBROKER.

**Sentence***Computation of time from passing.*

The term of imprisonment in pursuance of any sentence runs from the day of the passing of such sentence, without interruption, except when especially provided otherwise by law. The revocation of a ticket of leave by the Crown, without cause assigned, works no interruption in the running of the sentence which shall terminate at the same time as if such license had never been granted.

R. v. JOHNSON, (QUE.) 178

*Limit of, on summary trial for aggravated assault.*

On a charge under Cr. Code, sec. 783 (c) of aggravated assault with grievous bodily harm, a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months' imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions.

R. v. ARCHIBALD, (ONT.) 159

*Limit of—Reducing illegal sentence on case reserved.*

To justify a sentence of more than three years' imprisonment for assault and wounding a public officer, the charge must allege that the offence was committed while the officer was engaged in the execution of his duty (Code sec. 243). The Court of Appeal hearing a case reserved as to the validity of the sentence has power under Cr. Code, sec. 476 (c), to correct the erroneous sentence.

R. v. DUPONT, (QUE.) 566

**Service of process**

See MAGISTRATE.

SUBSTITUTIONAL SERVICE.

**Sheriff***Disqualification of—Invalidity of proceedings.*

Where a grand jury has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff.

R. v. MCGUIRE, (N.B.) 12

**Similar offences***Conviction for lesser offence.*

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft.

R. v. LAMOUREUX, (QUE.) 101

**Society***Information—Appeal in name of the society*

Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed.

CANADIAN SOCIETY v. LAUZON, (QUE.) 354

**Speedy trials***Charge not founded on depositions.*

A reserved case upon an objection taken before pleading, that the charge, upon which the accused was arraigned for a "speedy trial," was not founded upon the evidence adduced at the preliminary enquiry should not be heard by the Appellate Court to which it is referred until after the trial has been concluded, and then only in case of conviction.

R. v. TREPANIER, (QUE.) 259

**Staple commodities**

Act of 1901 respecting packing and sale of.

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**Stated case***Summary trial with consent.*

A magistrate trying a charge of theft of goods of the value of less than \$10 under the summary trials procedure (Code secs. 783 and 786) with the consent of the accused, is not a "Court or judge having jurisdiction in criminal cases" within Code sec. 742 allowing an appeal by way of case reserved. *Semble*, the proper mode of review of any question of law involved on such a trial is by way of "stated case" under Code sec. 900.

R. v. HAWES, (N.S.), 529

Right of appeal or of stated case; Summary trial; Note.

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**Statutes**

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| Criminal Code Amendment Act, 1901.      | 585 |
| Canada Evidence Act, Amendment of 1901. | 588 |
| Chinese Immigration Act, 1900.          | 589 |
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| Sale of Staple Commodities (1901).      | 597 |
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**Statutory declaration**

*Several declarants*—"Authorized by law" to declare.

On a charge under Code sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead. The permission granted by the Canada Evidence Act to certain officials to "receive" the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person "authorized by law to make a solemn declaration" (Code sec. 147). A statutory declaration jointly made by several persons and stating the matter declared in the following form, *i.e.*:—"We know that, etc," is to be construed as a statement by each of the declarants severally, that he knows the matters alleged.

R. v. SKELTON, (N.W.T.) 467

**Stay of proceedings**

*Effect of appeal from conviction.*

Where a licensee is convicted under sec. 122 (3) of "The Liquor License Ordinance" (N.W.T.) of supplying liquor to an interdicted person with a knowledge of such interdiction, the effect of such conviction being that his license shall be forfeited, an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction. The giving of a recognizance under Cr. Code, sec. 880, on an appeal from a summary conviction, operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from.

SIMINGTON v. COLBOURNE, (N.W.T.), 367

**Stealing**

See THEFT.



## Substitutional service

### *Proof of substitutional service.*

The proof of service of a magistrate's summons served substitutionally must shew that the defendant could not be conveniently served in person, and that the adult person substitutionally served for him at the defendant's place of abode is an inmate thereof. Where proof of the substitutional service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on certiorari. Evidence will not be received in the certiorari proceedings to supplement the proof of service given before the magistrate.

RE BARRON, (P.E.I.) 465

Summary proceedings; Defendant out of jurisdiction; Note. 466

## Summary conviction

### *Imprisonment for non-payment of fine.*

A magistrate trying a case under the summary convictions clauses may, under Cr. Code, sec. 872, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels.

EX PARTE GORMAN, (N.B.) 305

### *Obstructing a peace officer.*

The provisions of Cr. Code 144 fixing the punishment for which anyone guilty of obstructing a police officer shall be liable "on summary conviction" is not controlled by Code secs. 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused.

R. v. NELSON, (B.C.) 461

### *Defect of form or substance.*

The powers of amending a defective summary conviction conferred by sec. 883 of the Criminal Code of Canada do not extend to or apply to convictions made under an Ontario statute.

R. v. LEE, (ONT.) 416

Liability of corporation to; Note.

115

Substitutional service; Defendant out of jurisdiction; Note. 466

See APPEAL.

CERTIORARI.

COSTS.

MAGISTRATE.

**Summary trial***Effect of acquittal after "defence made."*

Where the offence is one which may be summarily tried by a police magistrate on consent, and the accused has given his consent and made his defence to the charge and been acquitted, it is no longer competent for the magistrate to turn the proceedings into a preliminary inquiry and to accept the prosecutor's recognizance to perfer an indictment.

R. v. BURNS, (No. 2), (ONT.) 330

*Without consent—Summary conviction—Penalty.*

A prosecution before a magistrate for the offence of being an inmate of a house of ill-fame is none the less a "summary trial" proceeding, although the magistrate's jurisdiction is absolute and is exercisable without the consent of the accused. The extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV. of the Criminal Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, \$100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded \$50 in addition to six months' imprisonment.

R. v. ROBERTS, (N.S.) 253

*Disorderly house—Keeping a bawdy house.*

An information charging the accused, for that she was "the keeper of a disorderly house, that is to say, a common bawdy house," must be taken to be a charge under Code sec. 198, for the indictable offence of keeping a common bawdy house, and is not cognizable under the special jurisdiction given to magistrates by Code sec. 783 (*f*), because not laid in the exact language of the latter section. Such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under Code sec. 785 (amendment of 1900). To give jurisdiction to a justice to punish on summary conviction the keeper of a disorderly house under the vagrancy clauses of the Code (secs. 207 and 208), the information must charge that the accused is a loose, idle or disorderly person or vagrant (sec. 208), and it is not sufficient to charge simply that the person is a keeper of a disorderly house,

**Summary trial—Cont.**

although that fact constitutes the person a loose, idle or disorderly person or vagrant, by virtue of Code sec. 207.

R. v. KEEPING, (N.S.) 494

Of aggravated assault; Note.

163

Of theft and kindred offences; Note.

168

Right of appeal or of stated case; Note.

532

**Summons**

See SUBSTITUTIONAL SERVICE.

**Sunday observance**

*Lord's Day Act (N.B.)—Constitutionality of.*

The New Brunswick statute to prevent the profanation of the Lord's Day, 62 Vict., ch. 11, is intra vires of the provincial legislature.

RE GREENE, (N.B.) 182

*Finding on question of fact.*

The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon certiorari, and the same can be attacked only by way of appeal from the conviction.

R. v. URQUHART, (ONT.) 256

*"Keeping open" of barber shop.*

A conviction for "keeping a barber shop open" on Sunday, contrary to a municipal by-law, cannot be supported upon the mere admission of the accused, when called upon to plead, that he had shaved customers in his shop on the day named. *Semble*, a barber who exercises his trade at his shop with the doors barred cannot be said to be "keeping open."

RE LAMBERT, (B.C.) 533

*Selling cigars on Sunday.*

The selling of cigars on Sunday may be prohibited either directly by a provincial legislature or by municipal by-laws authorized by such legislature; and in either case such restriction is of a merely local nature, and is to be classed as a police or municipal regulation and not as a matter essentially appertaining to the "criminal law," and so within the sole competence of the Parliament of Canada. The New Brunswick statute to prevent the profanation of the Lord's Day, 62 Vict. ch. 11, is intra vires of the provincial legislature.

RE GREENE, (N.B.) 182

**Sureties**

See BAIL.

ESTREAT.

**Theft***Admissibility of evidence of similar criminal acts.*

Evidence of other similar criminal acts may be relevant in a charge of theft if it bears upon the question whether the taking was designed or accidental. Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it *tends* to shew that the accused had been so guilty.

R. v. COLLYNS, (N.W.T.) 572

*Stealing "in or from" a building—One offence.*

A conviction for stealing "in or from" a building charges only one offence and is not, because of the disjunctive, void for duplicity and uncertainty. R. v. PATRICK WHITE, (N.S.) 430

*Of money—Possession by accused of money not accounted for.*

If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, it is shewn that the accused, one of the ship's seamen, had access in common with the other seamen to the place where the box was kept, that shortly before the theft was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shewn to be untrue, such constitutes legal evidence to support a conviction. If, however, the trial judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial.

R. v. MACCAFFERY, (N.S.) 193

*Amount less than \$10.—Summary trial.*

A person accused of the theft of a sum of money less than \$10, not charged as a "stealing from the person" (Cr. Code, sec. 344), is liable, on his summary trial with his own consent before a police magistrate, to no greater term of imprisonment than six months (Cr. Code, sec. 787).

R. v. RANDOLPH, (ONT.) 165

Summary trial of theft and kindred offences; Note.

168

**Ticket of leave***Revocation of, without fresh conviction.*

The license issued under the authority of 62-3 Vict., ch. 49, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned. The revocation by the Crown, without cause assigned, of such license works no interruption in the running of the sentence which shall terminate at the same time as if such license had never been granted

R. v. JOHNSON, (QUE.) 178

Ticket of Leave Amendment Act, 1900.

595

**Tobacco duties***Raw leaf cut by purchaser for his own use.*

Under sec. 334 of the Inland Revenue Act (Can.) possession of domestic tobacco cut ready for use after purchase in the raw leaf is illegal unless the tobacco is put up in packages and the packages have revenue stamps attached. Such possession is illegal, although the possessor is not a tobacco manufacturer or trader, and notwithstanding that he purchased same in the raw leaf entirely for his own use, and gave it no other process of "manufacture" than cutting up the raw leaf.

R. v. SENECA, (QUE.) 137

**Transient traders**

See MUNICIPAL BY-LAWS.

**Trespass***"Fair and reasonable supposition of right."*

Under Cr. Code, sec. 511, the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of. The same rule applies to a charge of trespass made under R.S.O. 1897, ch. 120, sec. 1, under which the magistrate's jurisdiction is ousted if the accused "acted under a fair and reasonable supposition that he had the right to do the act complained of."

R. v. DAVY, (ONT.) 28

**Trial**

See CONVICTION.

INDICTMENT.

JURY.

SPEEDY TRIAL.

SUMMARY TRIAL.

**Uncertainty**

*Description of offence—Defect in substance or form.*

An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory, is void for uncertainty. Such a warrant charges no offence, and neither it nor a remand thereon is validated by Code sec. 578, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary enquiry before the justice. R. v. HOLLEY, (N.S.) 510

**Vagrancy**

See DISORDERLY HOUSE.

**Venue**

*Change of—Charge of defamatory libel.*

In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the Court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs. The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue. R. v. NICOL, (B.C.) 1

**Void process**

*Resisting bailiff—Void civil process.*

Where the process of an inferior Court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the Court, such process is insufficient upon which to base a conviction for resisting the officer in its execution.

R. v. FINLAY, (MAN.) 539

**Warrant***Warrant executed by unqualified person.*

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose.

EX PARTE GIBERSON, (N.B.) 537

*On remand for more than three clear days.*

Where on a preliminary enquiry a remand is desired for a time exceeding three clear days (Code sec. 586 (c)), the justice may remand only by warrant (Code Form P), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient.

R. v. HOLLEY, (N.S.) 510

*Commitment—Naming place of imprisonment.*

A warrant of commitment is bad if it simply directs the gaoler to "imprison" the defendant for the stated time, without specifying the place of imprisonment. The description of the place of imprisonment in a warrant of commitment is sufficient if the prison be described by its situation or some other definite description. The costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction for a third offence under the Nova Scotia Liquor License Act. Where the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant. *The Queen v. Doherty* (1899), 3 Can. Cr. Cas. 505, distinguished.

RE J. W. KING, (N.S.) 426

And see COSTS.

EXTRADITION.

**Weights and measures**

Amending Act of 1900 respecting.

593

**Witness***Calling presiding magistrate as witness.*

Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony.

**Witness—Cont.**

Where on an application to quash a summary conviction on the ground that the magistrate refused to give evidence on the trial before himself, the Court is satisfied, from the magistrate's affidavit and the evidence taken in the proceeding, that the magistrate was not a material witness and that the application to have him sworn as such was not made bona fide, the conviction should not be disturbed.

EX PARTE HEBERT, (N.B.) 153

*Refusal of warrant for arrest of defaulting witness.*

The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his Court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest, is not reviewable upon habeas corpus, although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest. Per Meagher, J.—The erroneous refusal of a magistrate to grant a warrant for the arrest of a defaulting witness will not deprive him of jurisdiction to convict, and the defendant's remedy is by way of appeal only. *Semble*, per Meagher, J., that the magistrate has a discretion to refuse to issue a warrant for a witness in proceedings under the N. S. Liquor License Act, although the witness has been duly summoned and has failed to appear.

R. v. CLEMENTS, (N.S.) 553

Incriminating answers; Objection to answer; Canada Evidence Act; Note. 269

**Words and phrases**

|  |     |
|--|-----|
| " Acting detective."                                     | 566 |
| " Action " for penalty.                                  | 173 |
| " Appearing the keeper."                                 | 209 |
| " Appertaining to the criminal law."                     | 182 |
| " Authorized by law " to make declaration.               | 467 |
| " Bawdy house."  | 216 |
| " Conclusive evidence."                                  | 358 |
| " Court or judge having jurisdiction in criminal cases." | 529 |
| " Disorderly house."                                     | 216 |
| " Entitled to cross-examine."                            | 145 |
| " Fair and reasonable supposition of right."             | 28  |
| " Final and conclusive."                                 | 153 |
| " Frequenter."   | 498 |
| " Full opportunity to cross-examine."                    | 145 |



**Words and phrases—*Cont.***

|  |     |
|--|-----|
| "Given in charge to the jury."                       | 145 |
| "Grievous bodily harm."                              | 159 |
| "House of ill-fame."                                 | 216 |
| "Housebreaking and theft."                           | 101 |
| "In or from" a building.                             | 430 |
| "Inmate."  | 498 |
| "Keeper."  | 498 |
| "Keeping open" of barber shop.                       | 533 |
| "Manufactured tobacco."                              | 137 |
| "Noxious or offensive trade or business."            | 338 |
| "Occupant."  | 392 |
| "Pawn, pledge or exchange."                          | 351 |
| "Perjury."   | 334 |
| "Person."  | 107 |
| "Practising medicine."                               | 416 |
| "Receiving stolen goods."                            | 101 |
| "Stand by."  | 343 |
| "Undertaking to tell fortunes."                      | 437 |
| "Valid conviction to sustain warrant of commitment." | 165 |

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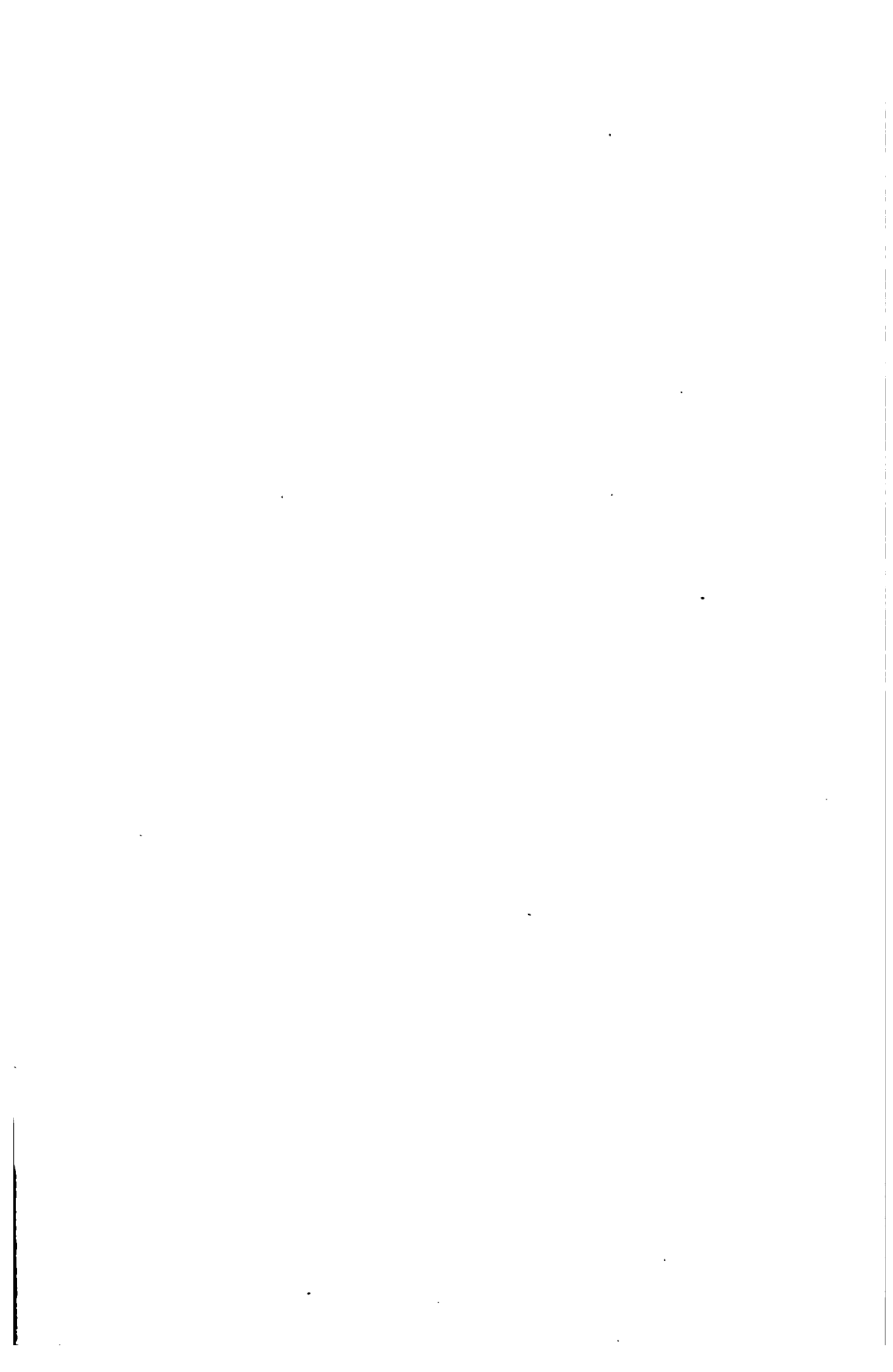
**CORRIGENDA.**

Page 474, line 14, for "section 613" read "section 618."









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**Warrant***Warrant executed by unqualified person.*

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose.

EX PARTE GIBERSON, (N.B.) 537

*On remand for more than three clear days.*

Where on a preliminary enquiry a remand is desired for a time exceeding three clear days (Code sec. 586 (c)), the justice may remand only by warrant (Code Form P), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient.

R. v. HOLLEY, (N.S.) 510

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